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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 16

MARK O. DAVIS, PETITIONER,

vs.

MAUDE E. DAVIS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED MARCH 30, 1938.

CERTIORARI GRANTED APRIL 25, 1938.

SUPREME COURT OF THE UNITED STATES

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INDEX.

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—6922

United States Court of Appeals for the District of Columbia

a. Supreme Court of the District of Columbia.

No. 43763 In Equity

Mark O. Davis, *Plaintiff*,

vs.

Maud E. Davis, *Defendant*.

United States of America,
District of Columbia, ss:

BE IT REMEMBERED, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:—

1 *Bill of Complaint.*

Filed March 10, 1925.

In the Supreme Court of the District of Columbia.

Equity. No. 43763.

Mark O. Davis, *Plaintiff*,

vs.

Maud E. Davis, *Defendant.*

The Bill of Complaint of **Mark O. Davis** respectfully shows to the Court:

2 1. That he is a citizen of the United States and a resident of the District of Columbia, and brings this suit in his own right.

2. That the defendant is a citizen of the United States and a resident of the District of Columbia, and is sued in her own right.

3. That the plaintiff and defendant were lawfully married at New York City on or about November 25, 1910, and have resided continuously in the District of Columbia as husband and wife.

4. That two children have been born of this marriage namely, Mark Davis, Jr., aged twelve, and Suzanne Davis, aged eight.

5. That since about the year 1915 the defendant continuously and frequently assaulted and made physical attacks upon the plaintiff by biting and scratching and striking him, and has frequently threatened to kill him; that she has used abusive and profane and indecent language toward him, both in public and private, and has falsely accused him of immoral and disgraceful conduct.

6. That on or about February 22, 1925, the defendant assaulted and threatened the plaintiff with a loaded revolver.

7. That on or about September 1, 1920, the defendant struck the plaintiff with an umbrella upon the head and seriously wounded him.

8. That on or about November 1, 1920, the defendant upon a public street in the city of Washington abused and threatened the plaintiff in a loud and violent manner, thereby subjecting him to public notoriety and scandal.

9. That by reason of the foregoing acts the plaintiff has been seriously affected in health and the peace and happiness of himself and his family have been destroyed and he is in constant dread of bodily harm at the hands of the defendant.

10. That all of the acts hereinabove alleged took place in the District of Columbia.

Wherefore the plaintiff prays:

1. That a writ of subpœna be issued to the defendant commanding her to appear and answer the exigencies of this Bill of Complaint.

3 2. That during the pendency of this suit the plaintiff be granted the care, custody and control of their minor children.

3. That upon a final hearing of this cause the plaintiff be granted a decree of divorce a mensa et thoro and that the custody of the said children be permanently awarded to the plaintiff.

4. For such other and further relief as to the Court may seem just and right.

MARK O. DAVIS.

H. RALPH BURTON,
WILTON J. LAMBERT,
TENCH T. MARYE,
Attorneys for Plaintiff.

DISTRICT OF COLUMBIA, *ss:*

I do solemnly swear that I have read the foregoing Bill of Complaint by me subscribed and know the contents thereof; that the matters and things therein stated as upon personal knowledge are true, and those stated as upon information and belief I believe to be true.

MARK O. DAVIS.

Subscribed and sworn to before me this 10th day of March, 1925.

LAURA HANSON WOOD,
[Seal] *Notary Public D. C.*

Answer of the Above-named Defendant, Maud E. Davis, to the Bill of Complaint in the Above Entitled Cause.

Filed March 18, 1925.

* * * * * * * * * *

The defendant, for answer to the said bill, states as follows:

1-2. She admits the allegations of the first and second paragraphs of the said bill and each of them to be true.

3. She admits that, as alleged in the third paragraph of the said bill, plaintiff and she were lawfully married at New York City and have continuously resided in the
4 District of Columbia as husband and wife, but she avers the fact to be that plaintiff and she were so married on November 24, 1909, and not on or about November 25, 1910, as in said paragraph alleged.

4. She admits the allegations of the fourth paragraph of the said bill to be true.

5-10. She denies the allegations and each of them of the fifth, sixth, seventh, eighth, ninth and tenth paragraphs of the said bill, and each of them, to be true.

And further, by way of answer to the said bill and of cross bill against plaintiff, defendant states as follows:

11. Plaintiff and defendant were lawfully married at New York City, State of New York, on November 24, 1909, and have since resided continuously in the District of Columbia as husband and wife and there have been born to plaintiff and defendant, as the fruit of their marriage, two children: a son, Mark O. Davis, Junior, age 12 years on December 4,

1924, and a daughter, Mary Suzanne Davis, aged 8 years on January 15, 1925.

From and after their marriage, plaintiff and defendant lived at the home of defendant's mother, 1518 Ninth Street, Northwest, Washington, D. C. until, to wit, May 1, 1910, when they rented a furnished house, No. 1725 Corcoran Street, Northwest, in said city, where they lived together until, to wit, October 1, 1910, when they moved to and occupied apartments in the Lanier apartment house, in Lanier Place, Northwest, in said city, where they remained until September 27, 1913, when they removed to and have since together occupied house No. 2810 Adams Mill Road, Northwest, in said city.

The occasion and cause of the leaving by plaintiff and defendant of the home of defendant's mother was plaintiff's indecent behavior towards and treatment of defendant's niece, then a child of, to wit, 8 years of age, complaint of which by defendant's sister, the mother of said child, made the further residence of plaintiff and defendant in the house of defendant's mother impossible, the details of which treatment defendant is advised it is unnecessary here to state in detail, but which she stands ready to show to the Court should occasion arise. And while plaintiff and defendant were living at the Lanier apartments aforesaid, plaintiff, who is by profession a dentist and doctor of dental surgery, was guilty of similar conduct toward a child patient of his of the age of, to wit, 12 years, the disclosure of which caused defendant great concern and physical and mental suffering. And since living at No. 2810 Adams Mill Road, plaintiff has on at least two occasions been guilty of similar conduct toward young girls of the respective ages of, to wit, 8 and 10 years, to the great distress and mortification of defendant and to the detriment of her health and happiness accordingly.

Beginning at an early day after their marriage, plaintiff has been continuously guilty of grossly abusive and cruel treatment of defendant, among others upon the occasion and in the ways following:

While defendant was eight and one-half months advanced in pregnancy before the birth of her son and while she was living with plaintiff at the Lanier apartments aforesaid, she was by plaintiff locked out of their apartment and com-

pelled to lie for a period of, to wit, four hours and until midnight on the stairway, and was readmitted by plaintiff to her apartment only after prolonged and persistent endeavors by her to induce him so to do, following which occasion plaintiff declined and refused even personal converse with defendant for a period of several days.

When the son of plaintiff and defendant was within a few months of 2 years of age and had fallen upon the floor and bruised his head and defendant was ministering to him, plaintiff, wholly without just or any cause or provocation, violently struck defendant with his fist and knocked her a distance of, to wit, eight or ten feet across the room and down to and upon the floor, bruising and blacking defendant's face and causing her great shock, both physical and mental, from which she did not recover for a space of several days. Subsequently and on several, to wit, at least twelve occasions, plaintiff again without just or any cause or provocation slapped and with his fist struck defendant, severely bruising her and causing her similar shock, both physical and mental. When the daughter of plaintiff and defendant was of the age of, to wit, 2 years and had slipped and fallen upon the floor and defendant was engaged in consoling and endeavoring to comfort the child, plaintiff with sundry profane imprecations against defendant seized an umbrella and with the same severely beat defendant upon her head and face, bruising and scarring the
6 same and causing defendant great pain and shock, both physical and mental, and it is this incident which plaintiff has falsely mentioned in the seventh paragraph of his said bill of complaint as therein and therefrom appearing. To wit, about three months subsequent to the occasion last mentioned, plaintiff again without just or any cause or provocation violently assaulted defendant, striking her twice in the face and knocking her to the floor, to her suffering as aforesaid. Also at or about the same time, defendant being advanced three months in pregnancy, so informed plaintiff, who stated that he wished no more children and caused defendant to submit to an examination by himself to verify, or the contrary, the statement of the defendant as to her condition and in so doing, without defendant's consent or connivance, plaintiff with an instrument performed upon defendant an operation resulting in

a miscarriage by her, and plaintiff subsequently so admitted to defendant, warning her not to acquaint her physian with the fact, saying at the time that disclosure thereof would subject him to a long imprisonment in the penitentiary.

On sundry occasions other than those mentioned, plaintiff violently assaulted and beat defendant and profanely cursed and abused her, applying to her the most opprobrious epithets and frequently in the presence and hearing of her children or one of them; and plaintiff on numerous occasions threatened to take from defendant her children and see to it that she would never see them again.

All of the foregoing and other instances of plaintiff's cruel and abusive treatment of defendant, which she stands ready to narrate and verify should occasion arise, have caused defendant great suffering, both physical and mental, and have threatened to impair and in fact have impaired her health, both physical and mental, and even risked her life.

12. Plaintiff is a man of extreme animal passions and lascivious disposition and has on more than one occasion sought to compel defendant to indulge with him in unnatural practices for the gratification of his desires, and on defendant's indignantly refusing to accede to plaintiff's suggestions in that behalf she has been assaulted and verbally abused by plaintiff, to her great shock and distress. But for a period of, to wit, 2 years last past plaintiff has
7 wholly abstained from marital intercourse with defendant and has even refused the same for the reason, as defendant believes and therefore avers and charges, that plaintiff has become enamored of one Jane Parke Grow, an attendant and assistant in the office of plaintiff, and for the reasons hereinafter appearing defendant believes and accordingly avers and charges that plaintiff has been guilty of repeated acts of adultery with said Jane Parke Grow. Plaintiff is and for, to wit, 25 years last past continuously has been a doctor of dental surgery, so-called, practicing the art of dentistry, and for the past, to wit, 16 years having his offices in the Farragut apartment house, in the City of Washington, District of Columbia, and for, to wit, 5 years last past has had the said Jane Parke Grow in his employ as an attendant, as aforesaid, to whom, as

defendant from her own observation as well as the report of others knows, plaintiff has been affectionately and demonstratively attentive. During a protion of the period last aforesaid, the said Jane Parke Grow shared an apartment with her sister and brother-in-law at the Chesterfield apartments on Mt. Pleasant Street, in the City of Washington aforesaid, and while there was frequently and repeatedly visited by plaintiff under conditions such that the said Jane Parke Grow was requested to leave and left the said apartments and took an apartment at premises No. 2008 Sixteenth Street, Northwest, in said city, where she has similarly been frequently and repeatedly visited by plaintiff since, to wit, September, 1924, and defendant has herself seen plaintiff go into the said premises, both in day time and night time, and there remain for several hours at a time, and on a great many of such occasions defendant has seen plaintiff reach the floor of the said premises on which the apartment of the said Jane Parke Grow is, and also to return therefrom at late hours of the night, by means of the fire escape on the outside of the said premises. For the reasons appearing, defendant believes and accordingly avers and charges that plaintiff has been guilty of adultery with the said Jane Parke Grow, as aforesaid, that such adultery was committed without the consent, connivance, privity or procurement of defendant, and that after discovery of the offense defendant has not voluntarily or at all cohabited with plaintiff.

8 13. As hereinbefore stated, plaintiff has for, to wit, 25 years been engaged in the practice of dentistry in the District of Columbia and has had and has a large and extensive practice, yielding him, as defendant believes and accordingly avers and charges, not less than Thirty Thousand Dollars ($30,000.00) per year, and in addition thereto plaintiff is the owner and possessor of the premises No. 2810 Adams Mill Road, aforesaid, of the value of, to wit, Forty Thousand Dollars ($40,000.00) and has other and large means consisting of bonds, stocks and other securities and ready money, the extent and value of which defendant does not know, but which she believes and avers to be very large; notwithstanding which, throughout their married life plaintiff has afforded defendant but one servant to assist in the management and care of their house-

hold and has compelled her personally to attend and care for the furnace, the floors, the windows and rugs of their home, and has thereby subjected defendant to menial services and drudgery, all to the detriment of her health and on at least one occasion causing her to suffer miscarriage.

14. Notwithstanding the cruelties and indignities to which the defendant has been subjected by plaintiff, as hereinbefore appearing, defendant, to avoid the inevitable scandal of a disclosure of the situation and for the sake of her children, has endeavored patiently to bear her situation, but the same becomes and is no longer tolerable by her and accordingly, in the latter part of February, 1925, she consulted counsel with a view to instituting against plaintiff a proceeding for divorce, alimony and the custody of her children, and so informed plaintiff; and on, to wit, March 1, 1925, defendant's counsel wrote plaintiff that he had been consulted by defendant as aforesaid and asked plaintiff either by himself or through a representative to take up for consideration the question of the relations between plaintiff and defendant, and on the following day defendant's counsel was notified by Roger J. Whiteford, Esq., that he had been consulted by plaintiff in the premises and was ready for a conference respecting the same. Thereafter defendant's counsel and the said Whiteford conferred in the premises, but without effective result, and on March 10, 1925, plaintiff surreptitiously took from their residence the children of plaintiff and defendant and since has kept them secreted and denied defendant both access to
9 them and knowledge of their whereabouts. At or about noon on the same day, defendant notified her counsel of plaintiff's said act and her counsel thereupon immediately called the office of Mr. Whiteford and was informed that he, Mr. Whiteford, had no longer any relation to the case and was referred to Wilton J. Lambert, Esq., as counsel for plaintiff. Defendant's counsel thereupon called Mr. Lambert by telephone and was by him informed that Mr. H. Ralph Burton had called him, Mr. Lambert, with reference to the case on "A Mr. Davis", whom he, Lambert, did not know and had never seen and about whose case he had no knowledge, and on Mr. Lambert's suggestion defendant's counsel called the office of plaintiff by telephone and was answered by a woman attendant, who asked the

name of the caller, to which she received the reply that plaintiff himself was desired at the telephone, and after a brief delay she informed defendant's counsel that he would not come but that she would take whatever message there was for him; whereupon defendant's counsel told the said attendant to say to plaintiff that unless the children should be returned to defendant the consequences would be his, plaintiff's, and again insisted that plaintiff come to the telephone, to which he received the reply from the said attendant, "He has left"; and subsequently and on the same day, to wit, March 10, 1925, plaintiff instituted this suit, of which defendant was informed by a newspaper reporter at or after 5 o'clock P. M., and defendant immediately communicated the fact to her counsel, who thereupon called Mr. Lambert by telephone, informing him that his, Lambert's, name was signed to the bill of complaint, whereupon Mr. Lambert stated to defendant's counsel that he, Lambert, knew nothing whatever of the suit, that he had never seen plaintiff and had never seen the bill of complaint.

15. Since the filing of plaintiff's bill of complaint and on the evening of the day thereof, to wit, March 10, 1925, plaintiff brought to the residence, No. 2810 Adams Mill Road aforesaid, two men, one of them his grown son by a former marriage and the other whose name was given as Bryan, who assisted plaintiff in removing from the house certain articles for defendant's children and the latter of whom, the said Bryan, later returned with plaintiff and spent the night with him, and every night since plaintiff's said son, although theretofore but a most casual and infrequent visitor at the house, has spent the night therein with plaintiff. Moreover, since the filing of plaintiff's said bill defendant has been called upon by a man giving his name as Henderson, professing to be a lawyer and the attorney of the husband of the said Jane Parke Grow and in sympathy with defendant, who made repeated attempts to get personal access to and conversation with defendant, and once even in her bed room, which she repeatedly refused, and on two occasions the said Henderson said to defendant that if he were she, in view of the circumstances as he understood them to be, he would throw vitriol in the face of the said Jane Parke Grow; also the said Henderson, so-called, professed to be a guest at the Lee House, in the City of

Washington, and defendant upon inquiry learned that no such person was there registered; and subsequently the said person called Henderson telephoned defendant that he had an important telegram from the said Grow which could be delivered only in person to defendant and defendant then informed him that she had learned that he was not at the Lee House, as stated, and shortly thereafter he called at defendant's residence, insisting upon and endeavoring to reach her to deliver the alleged telegram aforesaid, and as defendant from the window of her residence informed the said person that she could have nothing to do with him and wanted him not to annoy her further, defendant saw standing a short distance up the street plaintiff, evidently awaiting the report of the said person of his mission and who was joined by the said person and the two went off together.

16. Since surreptitiously taking and secreting the children of plaintiff and defendant, as aforesaid, defendant, agonized by the deprivation of their company, of which theretofore she had never been wanting for so much as a day, implored plaintiff to return the children or else to inform her where she might see them, and received from him the reply that she would never see them again except dead, and until now plaintiff has persisted in refusing to disclose the whereabouts of the said children or to give defendant any information whatever in relation thereto. And although, as plaintiff well knew, defendant's counsel
11 was for days confined to his home and bed by a severe attack of lumbago, incapacitating him for work, plaintiff, tauntingly asked defendant if she knew why her counsel was delaying in meeting the bill of complaint, and upon her explaining that it was because of her counsel's illness plaintiff retorted, no, that the real reason was that the plaintiff had sent defendant's counsel One Thousand Dollars ($1,000.00) and that was why he, counsel, was holding off.

17. Defendant is wholly without financial means or resources and when plaintiff took away the children, as aforesaid, he left defendant penniless and since has furnished her with but Twenty Dollars ($20,00), obviously primarily to enable defendant to procure necessary meals for plaintiff and his said son; and so, being without financial resources, defendant will be unable either to maintain herself during

the pendency of this cause or to compensate her counsel without due order and direction of the Court in respect thereof.

18. Plaintiff is an unfit person to have the care, custody or control, either permanently or temporarily, of the children or either of them of plaintiff and defendant, and defendant is suited and entitled to have their exclusive custody and control, with reasonable privilege to plaintiff as respects their companionship at stated times and for prescribed periods.

19. Defendant is in fear of plaintiff, and verily believes herself to be in constant danger of harm by him, especially in view of the filing of this her answer and cross-bill, and she desires and requires suitable and adequate protection accordingly by appropriate order of the Court.

The premises considered, defendant prays as follows:

First. That plaintiff be required to answer the exigency hereof;

Secondly. That process may duly issue to the aforesaid Jane Parke Grow as party co-respondent with plaintiff hereto, requiring her to appear and answer the exigency hereof;

Thirdly. That plaintiff be required forthwith to produce in court, to be subject to its directions and orders, the children and each of them of plaintiff and defendant;

Fourthly. That defendant be granted an absolute divorce from plaintiff, with retention of her right of dower
12 in plaintiff's estate, or a separation or divorce from the bed and board of plaintiff, as to the Court may seem proper upon the evidence to be adduced herein;

Fifthly. That both *pendente lite* and on final hearing hereof defendant be awarded the custody and control of the children, and each of them, of plaintiff and defendant, and also suitable sums to be paid by plaintiff for the maintenance and support of defendant and the said children, for the prosecution of her suit, and for fees for her counsel;

Sixthly. That plaintiff be restrained and enjoined from molesting or in any way disturbing, interfering with or annoying defendant, either during the pendency of this cause or upon and after the determination hereof;

Seventhly. That plaintiff be required to discover and disclose his financial faculties and resources and his estate,

both real and personal, and especially to answer forthwith the interrogatories to be filed after the filing hereof, conformably to the provisions of Equity Rule No. 54 of the Court; and

Eighthly. That defendant may have such other and further relief in the premises as to the Court may seem meet and proper.

MAUD E. DAVIS,
Defendant and Cross-plaintiff.

HENRY E. DAVIS,
Attorney for Defendant and Cross-plaintiff.

DISTRICT OF COLUMBIA, *ss:*

Before me, a Notary Public, in and for the District aforesaid, personally appeared Maud E. Davis, who, being by me first duly sworn, deposes and says that she knows the contents of the foregoing answer and cross-bill by her subscribed, and that she verily believes the statements therein made to be true.

MAUD E. DAVIS.

Subscribed and sworn to before me this 17th day of March, 1925.

MAUD FELLHEIMER,
[Seal.] *Notary Public, District of Columbia.*

13 *Answer of Mark O. Davis to Cross-complaint.*

Filed June 9, 1925.

* * * * * * * *

The plaintiff and cross-defendant for answer to the cross-complaint filed herein states as follows:

11. Plaintiff admits that the plaintiff and defendant were lawfully married at New York City, State of New York, on November 24, 1909; that they have since resided continuously in the District of Columbia as husband and wife and that there have been born to plaintiff and defendant two children, a son, Mark O. Davis, Jr., aged twelve on December 4, 1924, and a daughter, Mary Suzanne Davis, aged eight on January 15, 1925.

Plaintiff admits that from and after their marriage, plaintiff and defendant lived at the home of defendant's mother, 1518 Ninth Street, Northwest, Washington, D. C.,

until, to-wit, May 1, 1910, when they rented a furnished house, Number 1725 Corcoran Street, Northwest, in said city, where they lived together until, to-wit, October 1, 1910, when they moved to and occupied apartments in the Lanier Apartment House, in Lanier Place, Northwest, in said city, where they remained until September 27, 1913, when they removed to and have since together occupied house Number 2810 Adams Mill Road, Northwest, in said city.

Plaintiff denies absolutely that he was ever guilty of indecent behavior, or anything that might be construed as such at any time toward the niece of the defendant. Plaintiff denies absolutely that he was ever guilty of improper conduct, or anything that might be construed as such, toward a child patient of the age of, to-wit, 12 years or any other child patient.

Plaintiff denies that since living at 2810 Adams Mill Road, he has on any occasion been guilty of improper conduct toward any girl whatsoever.

Plaintiff denies that he has ever been guilty of grossly abusive treatment of defendant.

Plaintiff denies absolutely that while living at the Lanier Apartments aforesaid he locked defendant out of their apartment or compelled defendant to lie for a period of, to wit, four hours on the stairway and states that the only incident he can recall during their occupancy at the
14 Lanier Apartments which might be used as a basis for such an allegation was on an occasion when defendant had gone out by herself for the evening and upon returning rang the door bell which plaintiff answered immediately upon hearing the same, and plaintiff states that to the best of his knowledge and belief defendant can not have waited more than several minutes at the most. Plaintiff further states that on no occasion was defendant ever compelled, to lie upon the stairs of the Lanier Apartment House and further that on no occasion did he, the plaintiff, ever refuse to allow defendant to enter their apartment immediately upon knowing that defendant so desired to enter.

Plaintiff denies singly and severally all of the remaining allegations of Paragraph 11.

12. Plaintiff denies that he is a man of extreme animal passion and lascious disposition, or that he has ever at

any time sought to compel the defendant to indulge with with him in unnatural practices for the gratification of his desires, for which reason there could be no occasion for an assault or verbal abuse by plaintiff in relation thereto, which plaintiff unqualifiedly denies.

Plaintiff further denies that for a period of, to wit, two years last past he has wholly abstained from marital intercourse with defendant.

Plaintiff further alleges that the defendant dwells constantly on matters of sex on any and all occasions, regardless of who is present, and that during the period of, to wit, two months previous to the filing of plaintiff's bill herein on, to wit, March 10, 1925, the language of the defendant became so vile and indecent in the presence of the children of plaintiff and defendant that plaintiff felt compelled for the good of said children to remove them from the presence of the defendant until their custody could be determined by this Honorable Court.

Plaintiff further alleges that during said period of, to wit, two months, defendant became so constantly abusive and indulged in such violent and disgusting personal attacks upon plaintiff that life in the same house with defendant became intolerable and impossible.

Plaintiff admits that one Jane Park Grow is an assistant in his office, where she has been employed for the last five years, but denies that he has been guilty of adultery with said assistant or that he has been affectionately or demonstratively attentive to her.

Plaintiff admits that said assistant at one time lived with her sister and brother-in-law at the Chesterfield Apartments on Mount Pleasant Street, but denies that while there he frequently and repeatedly visited said assistant.

Plaintiff admits that he has knowledge of the fact that said Jane Park Grow occupied an apartment at No. 2008 Sixteenth Street, Northwest, but denies that he frequently and repeatedly visited her there, or that he ever entered or left said apartment at late hours of the night, or that he ever entered or left said apartment by means of the fire escapes.

13. Plaintiff denies that his profession of dentistry yields him $30,000 per year, or anything like that sum, and states that the allegations with reference to his, the plain-

tiff's finances have been answered in the answer to the rule to show cause filed herein on the 23rd day of March, 1925.

Plaintiff further denies singly and severally the remaining allegations of Paragraph 13.

14. Plaintiff admits that defendant notified him that she had consulted counsel as set forth in defendant's cross-complaint, but defendant had so frequently notified plaintiff of such an intention during a period of many years that plaintiff gave no heed to the statement of defendant until he, the plaintiff had received notice to such effect from her counsel, Henry E. Davis. Plaintiff thereupon engaged the professional services of Roger J. Whiteford and said Whiteford, as attorney for plaintiff, conferred with said Davis, attorney for defendant. When the conference between the said Whiteford and the said Davis had reached an apparent impass-, plaintiff informed the said Whiteford to discontinue as in his opinion it was useless to continue further negotiations and requested the said Whiteford to discontinue the said services, and plaintiff thereupon proceeded to file the bill herein.

Plaintiff denies that he on March 10, 1925, surreptitiously took from the residence of plaintiff and defendant the children of the plaintiff and defendant and secreted them, but on the contrary states that he took the children from the said residence in the morning of, to wit, March 10, 1925,

16 at the usual time and the usual way that he, the plaintiff, was accustomed to taking the said children for the purpose of transporting them to their respective schools; that because of the cruel and inhuman manner in which the defendant had been treating Mark O. Davis, the son of the plaintiff and defendant, and further because it was the intention of the plaintiff to immediately file a bill of divorce from the said defendant, and further because of the strange and indecent actions and language of the defendant toward and in the presence of the said children, plaintiff believed it was to the best interests of the said children to be removed from such an atmosphere as was caused by the presence of the defendant as heretofore and herein set forth that he, the plaintiff, requested his, the plaintiff's sister, to take the said children to the home of said sister and of the mother of the plaintiff situated in

Akron, Ohio, until such time as this Honorable Court might determine what should be done in the premises.

Plaintiff further answering the allegations of Paragraph 14, states that he knows nothing whatever of the alleged conversation occurring on, to wit, March 10, 1925, for which reason plaintiff neither affirms nor denies, but calls for strict proof.

15. Plaintiff admits that on, to wit, March 10, 1925, he, the plaintiff, brought to his residence, No. 2810 Adams Mill Road, two men, one of whom was his own son by a former marriage, but denies that the said two men took any part in removing articles from the said house. The only articles taken from the house on said date being certain articles of clothing of the plaintiff's said son, Mark. Plaintiff states that although necessary clothing was requested by him, the plaintiff, of the defendant for the said daughter, Suzanne, the defendant refused to deliver the same to the plaintiff.

Plaintiff admits that his said son, Channing O. Davis has slept in the plaintiff's house every night since, to wit, March 10, 1925, and although plaintiff is advised that such action is within his rights, offers the explanation of such action that because of the vicious and unwarranted attacks theretofore made upon the plaintiff by the defendant and because of the false and malicious statements made by the defendant against the plaintiff, the plaintiff is unwilling to submit himself to such attacks and to such false and malicious accusations unless accompanied by another

17 adult person.

Further answering Paragraph 15, plaintiff denies that he even knows any person by the name of Henderson and further denies that he, the plaintiff, at any time since, to wit, March 10, 1925, met any person in the neighborhood of his residence, 2810 Adams Mill Road.

16. Plaintiff denies that the children of the plaintiff and defendant have never been away from the defendant for so much as a day, but on the contrary states that on one occasion he, the plaintiff, took both of the said children away from the District of Columbia by and with the consent of the defendant for a period of approximately ten days; that for the past two summers, to wit, 1923 and 1924, the son of the plaintiff and defendant, Mark O. Davis, Jr.,

has spent the months of July and August in a boys camp in Pennsylvania.

Plaintiff denies absolutely and unequivocally that he ever made any remark whatsoever to the defendant to the effect that she, the defendant, would never see the said children again except dead, and states that no remarks whatsoever were made from which such an inference could be drawn.

Further answering the allegations of Paragraph 16, plaintiff denies absolutely and unequivocally that he tauntingly asked defendant if she knew why her counsel was delaying in making the bill of complaint, or that he, the plaintiff, stated that he had sent the defendant's counsel $1,000, and respectfully calls the attention of this Honorable Court to the fact that although defendant's counsel has filed an extensive affidavit herein, he, the defendant's counsel, has made no reference to the receipt of any such sum.

17. Plaintiff denies that when he, the plaintiff, sent the said children away, as hereinbefore set forth, the defendant was penniless, or that from said time to the date of the filing by defendant of her answer and cross-complaint herein, he furnished the defendant with but $20, but on the contrary states that defendant was supplied with funds during the month of February, 1925, from which she should have had ample funds on hand on the 1st of March; that on the 1st of March the defendant received $45 from the rent of rooms in the said house, No. 2810 Adams Mill
18 Road, which said house is the property of the plaintiff; that between the 1st of March and the filing of defendant's answer and cross-bill herein, plaintiff gave the defendant the sum of $40 in addition to which he paid the wages of the servant, the milk bill, the telephone bill, gas bill and electric light, coal bill and all other bills for the maintenance of the house as has always been his custom and practice.

18. Plaintiff denies that he is an unfit person to have the custody and care, permanently or temporarily, of the children, or either of them, of the plaintiff and defendant, and states that for the reasons herein set forth in the answer filed herein on the 23rd day of March, 1925, the defendant is wholly and absolutely unfit to have the care of the said children and in the belief and opinion of the plaintiff said custody would result in serious physical injury and mental

suffering to the son of the plaintiff and defendant, Mark O. Davis, Jr., and to the moral and mental detriment of the daughter of the plaintiff and defendant, Mary Suzanne Davis.

19. Plaintiff denies that the defendant is in fear of him, the plaintiff, or has any cause to be in such fear, and states that in his belief and opinion, the defendant in stating that she believed herself to be in constant danger and harm by plaintiff for any cause whatsoever, the defendant knowingly and willfully made a false statement for the furtherance of her cause.

I do solemnly swear that I have read the foregoing answer to the cross-complaint of the defendant and know the contents thereof; that the matters and things therein stated as upon personal knowledge are true, and those stated as upon information and belief I believe to be true.

MARK O. DAVIS.

Subscribed and sworn to before me this Sixth day of June, 1925.

[SEAL.] BERENICE H. BROY,
Notary Public, D. C.

19 *Answer of Jane Park Grow to Cross-bill.*

Filed June 9, 1925.

* * * * * * * *

Now comes Jane Park Grow and for answer to so much of the Cross-bill of the defendant herein as refers to herself states as follows:

She admits that she is an assistant in the office of the plaintiff, and has been so employed for the last five years; she denies that she has been guilty of adultery with the plaintiff; she denies that the plaintiff has been affectionately and demonstratively attentive to her; she admits that she at one time shared an apartment with her sister and brother-in-law at the Chesterfield apartments on Mt. Pleasant Street, but she denies that while there she was frequently and repeatedly visited by the plaintiff, or that she was requested to leave the said apartments; she admits that she has been occupying an apartment at No. 2008 Sixteenth Street, Northwest, but she denies that she has been frequently and repeatedly visited by the plaintiff there or that

the plaintiff has ever entered or left said apartment at late hours of the night or that he has ever entered or left said apartment by means of the fire escape.

And having answered the allegations of the Cross-bill so far as concerns herself, this affiant respectfully requests that she be hence dismissed with her reasonable costs in this behalf incurred.

I do solemnly swear that I have read the foregoing answer by me subscribed and know the contents thereof; that the matters and things therein stated as upon personal knowledge are true, and those stated as upon information and belief I believe to be true.

JANE PARK GROW.

Subscribed and sworn to before me this 4th day of June, 1925.

[SEAL.] BERENICE H. BROY,
Notary Public, D. C.

20 *Decree.*

Filed October 29, 1925.

This cause coming on to be heard upon the bill of complaint and the answer thereto, and the cross-bill of complaint and the answer thereto, and testimony having been taken in open court in support of the issues made by said bill and cross-bill, it is by the Court this 29th day of October, A. D. 1925.

Adjudged, ordered and decreed as follows:

1. That the said cross-bill be and the same hereby is dismissed.

2. That the prayer of the said bill of complaint for a limited divorce be and the same hereby is granted and the plaintiff is hereby granted a divorce from bed and board from the defendant, Maud E. Davis.

3. That the custody of the minor son of the plaintiff and defendant, Mark O. Davis, Jr., be and the same hereby is awarded to the plaintiff, and the custody of their minor daughter, Suzanne Davis, be and the same hereby is awarded to the defendant, with the right of the plaintiff to have the custody and society of her between the hours of 6 and 8, P. M., on each Wednesday and between the hours of 10:30 A.M., and 1 P. M., on each Sunday.

4. That the plaintiff pay the tuition charges for the said minor daughter, Suzanne, and pay to the defendant the sum of $300.00 per month for the maintenance of herself and their said daughter, Suzanne.

5. That the plaintiff pay to Henry E. Davis, counsel for the defendant, the sum of $1,250.00 as counsel fees.

WALTER I. McCOY,
Chief Justice.

21 *Petition for Reduction of Allowance for Alimony to Defendant and Maintenance for Daughter*

Filed April 16, 1935

* * * * * * * *

The petition of Mark O. Davis respectfully shows:

1. On October 29, 1925, by final decree entered herein, the plaintiff was awarded a divorce a mensa et thoro from the defendant and given the custody of the minor son of the parties, Mark O. Davis, Jr. The custody of the daughter of the parties, Mary Suzanne Davis Sousatt, then an infant of the age of eight years, was awarded to the defendant. The decree directed the plaintiff to pay tuition charges for said minor daughter and to pay to the defendant the sum of $300.00 per month for the maintenance of herself and said minor daughter. An allowance of $1250.00 was made as counsel fees to the defendant's attorney.

2. The testimony in said cause established the fact that the plaintiff was then earning from his profession as a dentist approximately $13,800.00 per year.

3. Subsequent to the date of the entry of the aforesaid decree, the plaintiff became an actual bona fide resident of Arlington County, Virginia, wherein he instituted an action for an absolute divorce against the defendant upon the ground of willful abandonment and desertion. Service of process was had upon the defendant by publication and personally in the District of Columbia. She appeared specially by counsel and, by appropriate plea, challenged the jurisdiction of the court to entertain the suit thus
22 instituted by the plaintiff herein. The issue raised by the plea was, by the court, referred to a master in chancery, who took testimony on the question of the bona fides of the plaintiff's residence in the State of Virginia.

The defendant appeared personally and by counsel at the hearings before the master. The report of the master found that the plaintiff was a bona fide resident of the State of Virginia, and this finding was confirmed by the court. On the 26th day of June, 1929 a final decree was entered, granting the plaintiff herein an absolute divorce from the defendant, awarding to the defendant the custody of the infant daughter, Mary Suzanne Davis Sousatt, and requiring the plaintiff herein to pay for the education, support and maintenance of his said daughter the sum of $150.00 per month, as will appear from the prior proceedings herein which are hereby made a part hereof.

4. Since the date of the entry of the decree herein, to wit, October 29, 1925, the plaintiff has paid to the defendant the allowance of $300.00 per month for alimony and support of said infant daughter of the parties.

5. On July 31, 1932 the said infant, Mary Suzanne Davis Sousatt, married Herbert Sousatt, who is at present employed by the American Trucking Association, with offices in the Transportation Building in this City, and, as plaintiff is informed and believes, and therefore avers, at an annual salary of $1860.00. The said daughter and her husband are living together, apart from the defendant herein, and have no children.

6. While the plaintiff, at the time of the entry of the decree herein, was earning about $13,800.00 per year, his earnings have for the past two years become greatly reduced. In 1933, the plaintiff's net income from his profession and all other sources was $10,196.06, but during that year he sustained losses on securities owned by him amounting to $18,436.70, resulting in a total net loss for the entire year of $8,240.64.

For the year 1934, his net income from all sources was $11,768.62. During that year he suffered a loss of
23 $4,383.13, leaving him a net income for the entire year of only $7,385.48.

7. As indicating that the marital difficulties of the parties, and the publicity incident thereto, have resulted in the reduction of the earning power of the plaintiff, the affidavits of Doctors Leslie M. Christie and George H. Becker are hereto attached and prayed to be read as a part hereof.

THE PREMISES CONSIDERED, the plaintiff prays:

1. That a rule may issue herein requiring the defendant to appear and show cause, if any she has, why the prayers of this petition should not be granted.

2. That an order may be entered herein vacating the decree entered herein October 29, 1925, or, in the alternative, that said last mentioned decree be modified so as to reduce the amount therein required to be paid by the plaintiff to the defendant as alimony for herself and maintenance for the daughter of the parties.

3. For such other and further relief as the nature of the case may require and to the Court may seem just and proper.

LECKIE & SHERIER

MARK O. DAVIS

By JOSEPH T. SHERIER
Attorneys for Petitioner.

Mark O. Davis, being first duly sworn, on oath states that he has read the foregoing petition by him subscribed, and knows the contents thereof; that the matters and things therein stated as of his personal knowledge are true, and those stated upon information and belief, he believes to be true.

MARK O. DAVIS

Subscribed and sworn to before me this 12'' day of April, 1935.

N. M. L. JENKINS
(Notarial Seal) *Notary Public, D. C.*

24 In Chancery.

MARK O. DAVIS, Complainant,

vs.

MAUD E. DAVIS, Defendant.

Final Decree.

This cause coming on this day to be again heard upon the bill of complaint and the papers formerly filed and read, upon the decrees heretofore entered in this cause at the April term, 1928, the December term, 1928 and at the February term, 1929, of this Court, upon the depositions of

O. P. Stewart, Mark O. Davis, Mark O. Davis, Jr., Carmen Bart and Iranell M. Jester, duly taken before one of the Commissioners in Chancery of this Court, pursuant to notice of the time and place of the taking thereof, duly served in person in this County by the Sheriff of this County upon Crandall Mackey and Frank L. Ball, counsel heretofore entering a special appearance for the defendant, Maud E. Davis, and pursuant to notice of the time and place of the taking of said depositions served in person in the City of Washington, D. C., upon Maud E. Davis, by Robert H. Cox, who duly made oath and affidavit to the execution of the said notice upon the said Maud E. Davis and further made affidavit that he is not a party to or otherwise interested in the subject matter in controversy in this suit, upon the exhibits filed with the said depositions.

Upon consideration whereof, it appearing to the Court from the evidence and independently of the admissions of either of the parties hereto in the pleadings or otherwise, that this cause has been properly matured and is properly upon the active docket and that the Court has jurisdiction in this cause, and it further appearing that the defendant on, to-wit, the 24th day of February, 1925, without just cause or excuse, wilfully abandoned and deserted the complainant and that such abandonment and desertion has been continuous and persisted in from said date; and it further appearing to the Court from the exhibits filed herewith that the Supreme Court of the District of Columbia in a certain
25 Chancery cause therein pending under the style of Mark O. Davis, Plaintiff vs. Maud E. Davis, Defendant, Equity No. 43763, by its decree entered on, to-wit, the 29th day of October, 1925, awarded the complainant in said suit a divorce a mensa et thoro from the defendant and that said complainant and defendant in said suit in the Supreme Court of the District of Columbia are the same parties complainant and defendant in this cause, (a duly authenticated copy of said decree of the Supreme Court of the District of Columbia and certified copies of the bill of complaint, the answer and cross bills therein filed and a transcript of the evidence taken in said cause being filed as exhibits herein and being considered by the Court); and it further appearing to the Court that more than three years has elapsed since the entry by the Supreme

Court of the District of Columbia of the decree for and in behalf of complainant awarding him a divorce a mensa et thoro from the defendant and that the wilful desertion and abandonment of the complainant by the defendant without just cause or excuse has been continuous and persisted in by her for a period of more than three years prior to the entry of this decree; and it appearing to the Court from satisfactory evidence produced before it that no reconciliation has taken place or is probable between the complainant and the defendant and that the separation of complainant and defendant has continued without interruption since the date of said desertion and since the granting by the Supreme Court of the District of Columbia of the said divorce to complainant, upon consideration whereof, the Court doth now adjudge, order and decree as follows:

1. That complainant be, and he is now hereby awarded a divorce a vinculo matrimonii from the defendant and that the marriage heretofore solemnized between complainant and defendant be, and the same is now set aside and annulled.

2. That the defendant be, and she is now hereby divested of all property rights, past, present and future in the property of complainant, real, personal and mixed.

3. That pending the further decree of this Court, defendant be, and she is now awarded the custody of Mary Suzanne Davis, subject to the right, however, of complainant to have the custody of the said Mary Suzanne Davis during the month of August of each year, and that complainant be, and he is now hereby required to pay the sum of
26 $150.00 per month for the education, support and maintenance of his said daughter during the eleven months of each year that she is in the custody of her mother and that during the month of August of each year whilst his daughter is in his custody he is to properly provide for the support and maintenance of his said daughter. That complainant be, and he is now hereby awarded the exclusive custody and control of his son, Mark O. Davis, Jr., subject to the right of defendant to see him if she so desire on Saturday of each week during the hours of 4 o'clock P. M., and 6 o'clock P. M.

4. That neither complainant nor defendant shall remarry for a period of six months from the date of the entry of this decree.

And it appearing to the Court that nothing further now remains to be done herein, upon consideration whereof, the Court doth now direct that this cause be placed upon the final docket of this Court, and that complainant pay the costs hereof.

And this decree is final.

HOWARD W. SMITH,
Judge.

Authentication of Record.

COMMONWEALTH OF VIRGINIA:

Circuit Court of the County of Arlington.

I, Wm. H. Duncan, Clerk of the said Court, do hereby certify that the writings annexed to this Certificate are true copies of originals on file and of record in said office.

Witness my hand and the seal of said Court this twenty-eighth day of June, 1929.

(Signed) WM. H. DUNCAN,
[Seal.] *Clerk.*

In re Mark O. Davis, Complainant; Maud E. Davis, Defendant. In Chancery. Final Decree.

I, Howard W. Smith, Judge of the Circuit Court of Arlington County, Va., do certify that Wm. H. Duncan,
27 who executed the foregoing attestation, is the Clerk of the said Court duly commissioned and qualified, and the said attestation is in due form of law by the proper officer.

In testimony whereof, I hereunto set my hand and seal, this twenty-eighth day of June, 1929.

(Sgd.) HOWARD W. SMITH,
[Seal.] *Judge.*

I, Wm. H. Duncan, Clerk of the said Court, hereby certify that the Honorable Howard W. Smith whose genuine signature is here subscribed to the following certificate, was; at the time of signing and attesting the same, Judge of said Court, duly commissioned and qualified.

Witness my hand and the seal of said Court this twenty-eighth day of June 1929.

(Sgd.) WM. H. DUNCAN,
Clerk.

Form No. 106, Special.

The Commonwealth of Virginia to the Sheriff of the County of Arlington, Greeting:

We command you that you summon Maud E. Davis to appear at the Clerk's office of the Circuit Court of the County of Arlington, at the rules to be held for the said Court on the 3rd Monday in March, 1928 to answer a bill in chancery, exhibited against her in our said Court by Mark O. Davis, and have then there this writ.

Witness Wm. H. Duncan, Clerk of our said Court, at the courthouse, the 24th day of February, 1928, and in the 152nd year of the Commonwealth.

WM. H. DUNCAN,
Clerk,
By R. E. REMINGTON,
Deputy Clerk.

Memo. The object of this suit is for complainant to procure a divorce a vinculo matrimonii from the defendant on the ground of desertion; to procure the exclusive custody and control of the infant children born of the marriage between complainant and defendant; to have defendant
28 divested of all property rights, past, present and future, in the property, real, personal and mixed of the complainant and for other, further and complete relief.

Teste:

WM. H. DUNCAN,
Clerk,
By R. E. REMINGTON,
Deputy Clerk.

[Endorsed:] Form No. 106, Special. Mark O. Davis vs. Maud E. Davis, 1803 Biltmore Street N. W., Washington, D. C. Subpoena in Chancery. To 2nd March Rules, Arlington County Circuit Court. N[illegible] found in my bailiwick. Given under my hand this 27 da[illegible] February, 1928. H. B. Fields, Sheriff, Arl. Co., Va.

Executed the within summons by reading to and leaving a true copy thereof with Maud E. Davis, at 1803 Biltmore Street N. W., Washington, D. C. at 6:35 P. M., February 27, 1928, in Apartment 102, and explained the pur-

port thereof to her, she being a non-resident of the State of Virginia, and I certify that I am not a party to or otherwise interested in the matters of controversy in this suit.

Given under my hand this 27th day of February, 1928.

H. B. FIELDS.

STATE OF VIRGINIA,
County of Arlington, To wit:

Subscribed and sworn to before me, the undersigned notary public, this 27th day of February, 1928, in my said County. My commission expires February 12, 1932.

EMMA A. WEEKLEY,
Notary Public.

A Copy. Teste.
Given under my hand the 24th day of July, 1929.

WM. H. DUNCAN,
Clerk,
By EDITH B. CORDER,
Deputy Clerk.

29 Filed Feb. 24, 1928.

In the Circuit Court for Arlington County, Virginia.

In Chancery.

MARK O. DAVIS, *Complainant,*
vs.
MAUD E. DAVIS, *Defendant.*

Mark O. Davis, complainant, exhibits this, his bill of complaint against Maud E. Davis, defendant, and thereupon says as follows:

1. That complainant is domiciled in and is and has been an actual bona fide resident of the County of Arlington, State of Virginia, for more than one year preceding the commencement of this suit, and has been continuously such resident and so domiciled in the said County and State since, to-wit, the 15th day of October, 1926.

2. That the defendant is domiciled in the City of Washington, District of Columbia.

3. That complainant and defendant, whose maiden name was Maud Smith Elliott, were lawfully married in the City

of New York, State of New York, by Rev. David James Burrell, on, to-wit, the 24th day of November, 1909. A duly certified copy of the marriage certificate is filed herewith, marked, "Exhibit No. 1," and is prayed to be read as a part hereof.

4. That two children were born of said marriage, to-wit, Mark O. Davis, Jr., now in his 16th year, and Mary Suzanne Davis, now in her 12th year.

5. That complainant is a dental surgeon and after said marriage he and the defendant continuously resided in the City of Washington, District of Columbia, until their final separation since which time complainant and defendant have been living apart from each other as will hereinafter be more fully set forth.

6. That the married life of complainant and defendant, due to the course of conduct on the part of defendant, was from its inception unhappy and with the passage of years became unbearable. That complainant desired children and that defendant objected to having children, although she was physically capable of so doing without danger to herself and on several occasions defendant performed or had performed abortions upon herself without complainant's knowledge and despite his protests against such shocking, immoral and criminal conduct on her part. That defendant unfortunately has a jealous and suspicious nature and disposition and violent temper, and that after said marriage she frequently gave way to bursts of temper in which she would from time to time abuse both complainant and the children, being particularly cruel and inhumane in her conduct on several occasions to her son then a boy of tender years. That with the passage of time defendant's conduct became more marked, and that as early as the year 1912 she began making the most outrageous charges against complainant, accusing him of immorale conduct with other women. That complainant, mindful of his marital vows and obligations, endeavored to reason with defendant and to persuade her that a continuation of such conduct on her part would inevitably lead to the breaking up of their home. That despite complainant's sincere and honest efforts and despite the entire absence of any truth in defendant's accusations, she continued the same, becoming more violent in her denunciations of complainant and

on many occasions, she actually cursed and abused him in the presence of the children, calling him the most vile names and threatening to take his life, repeatedly declaring her purpose and intention to make his life so miserable that he could not live. That so venomous did defendants become that she accused complainant of immoral conduct with his female office assistants and demanded that he discharge them, and in other ways sedulously sought to destroy complainant's professional reputation. That on many occasions, prior to the month of February, 1925, defendant struck, cursed and abused complainant and threatened to take his life, until, because of her violent conduct and for a continuous period of, to-wit, 9 years prior to January 2nd, 1925, complainant, being in fear that defendant would carry out her threats to kill him, was compelled to sleep with his bed room door locked. That on, to-wit, the 23rd day of February, 1925, between the hours of nine and ten o'clock
31 in the evening, defendant entered complainant's bed room and told him that she had a revolver loaded and intended to kill him and returned in a few minutes with a revolver in her right hand which she pointed at complainant and that thereupon, complainant, fearing that she would carry out her declared purpose, made a grab for the revolver, whereupon defendant threw her hand up and said revolver landed upon complainant's bed. That on this occasion, defendant stated to complainant that it made no difference as to loss of that particular weapon as she had her own revolver. When defendant left his room, complainant examined the said revolver and found it was not loaded. That this was the culmination of many similar threats and acts of violence on the part of defendant, directed both towards him and the children and that complainant, feeling that he could no longer remain under the same roof with defendant, in safety to both himself and the children, endeavored to have a conference with the defendant to see if some plan could not be mutually agreed upon for a separation. That at this conference, at which defendant's mother was present, defendant declined to discuss matters with complainant. That after this conference, in the course of which complainant sought by every means in his power to effect some amicable settlement of their marital difficulties which difficulties had been extending in

a progressive state over a period of, to-wit, thirteen years and steadily becoming more impossible of continuation due to the cruel and inhuman treatment by defendant of both complainant and the children, complainant was compelled in order to protect his health and the moral and physical welfare of the children to seek the aid of the courts in the District of Columbia. That thereupon, in, to-wit, the month of March, 1925, complainant filed in the Supreme Court of the District of Columbia a suit for partial divorce from defendant and the custody of the children. That in these proceedings the defendant herein filed an answer and cross bill, in which cross bill she perpetuated of record her oft repeated scandalous and unjustifiable accusations of infidelity on the part of complainant and sought an absolute divorce from complainant herein. That a mass of proof was taken in these proceedings and that by decree
32 entered therein on the 29th day of October, 1925, the cross bill of defendant herein, was dismissed and complainant herein was granted a divorce from bed and board from the defendant herein, complainant by said decree being awarded the custody of his son, Mark O. Davis, Jr., and defendant herein, the custody of their daughter, complainant being by said decree required to pay the tuition of and provide for the maintenance of his said daughter and the defendant. Duly certified copies of the bill of complaint filed by complainant in this proceeding in the District of Columbia and of the answer and cross bill of the defendant herein, therein filed, and of the said decree, are filed herewith, marked, "Exhibit No. 2, with bill of complaint," and are prayed to be read as a part hereof.

7. Complainant avers and charges that he is in no wise responsible for the disruption of the marital relations between himself and defendant and for the breaking up of their home, and that the defendant by her cruel and inhuman treatment of both complainant and the children, extending over a period of years prior to the month of January, 1925, is solely responsible therefor and defendant's course of conduct necessitated and compelled complainant to procure an order in the said suit filed in the District of Columbia to protect his life and the safety and welfare of the children, particularly his said son, as a result of which

order defendant finally left the portion of the home in the City of Washington she was then occupying. Complainant further avers and charges that defendant's conduct under the law constitutes wilful desertion and abandonment of complainant and that such desertion and abandonment of complainant has been continuous since, to-wit, the 24th day of February, 1925.

8. Complainant further avers and charges that defendant is not a fit and proper person, because of her nature and disposition, to have the custody of the children. Since the entry of the decree aforesaid by the Supreme Court of the District of Columbia, and although by the terms of said decree complainant was granted the right to see his daughter and to have her custody and society between the hours of 6 and 8 o'clock P. M., on each Wednesday and between the hours of 10:30 A. M., and 1 P. M., of each Sun-
33 day, defendant has rendered it impossible for complainant to see his said daughter and has sedulously sought in every way in her power to alienate the love and affection of his said daughter for him. That defendant, before her desertion and abandonment of complainant and despite his protests, frequently used obscene and profane language in the presence and hearing of the children and indulged in the discussion of sexual matters totally unfitted for them to hear. That complainant's information is that since the separation defendant freely discusses in an improper way and manner sexual matters and relations in the presence of their daughter, who as stated, is now in her twelfth year. Complainant avers and charges that such discussions by a mother in the presence and hearing of a twelve year old daughter indicates the total unfitness of defendant to have the custody of their daughter.

In view of the premises, complainant prays that he may be allowed to file this, his suit; that proper process may issue herein; that he may be awarded a divorce a vinculo matrimonii from the defendant; that he may be awarded the exclusive custody and control of the children, subject to the right of defendant to see them under the orders of this Court; that defendant may be divested of all property rights, past, present and future in the property, real, personal and mixed of complainant; that he may have all such

other, further and complete relief as the nature of his case may require and as to equity may seem meet.

And to this end complainant prays that the said Maud E. Davis may be made a party defendant hereto, and be required to answer the allegations hereof, answer under oath being hereby expressly waived.

And as in duty bound, complainant will ever pray, etc.

MARK O. DAVIS,
Complainant.

A Copy. Teste.
Given under my hand this 24th day of July, 1929.

WM. H. DUNCAN,
Clerk.

By EDITH B. CORDER,
Deputy Clerk.

34 Filed April 1, 1928.

In the Circuit Court of Arlington County, Virginia.

In Chancery.

MARK O. DAVIS, Complainant,

vs.

MAUD E. DAVIS, Defendant.

Plea to the Jurisdiction.

Now comes the defendant, Maud E. Davis, in her own proper person, appearing specially and for no other purpose than to file this plea to the jurisdiction of the court, and says that the complainant ought not to have or maintain his aforesaid suit against her for the reason that neither the said complainant nor defendant has been an actual bona fide resident of the State of Virginia for the period of one year next preceding the commencement of this suit as required by law.

And the said defendant further says that the said complainant is not now an actual bona fide resident of the State of Virginia as contemplated by law but that the residence he is attempting to establish is for the sole purpose of creating jurisdiction in this court to hear and determine

this suit for divorce and it is therefore a fraud upon the court and not a bona fide residence in contemplation of law.

All of which the said defendant is ready to verify.

Wherefor– she prays judgment whether this Court can or will take any further cognizance of the action aforesaid.

MAUDE E. DAVIS,
Defendant.

RICHARD E. WELLFORD AND
BALL AND DOUGLAS,
Counsel for Defendant.

DISTRICT OF COLUMBIA, *To wit:*

This day before me, Phidias J. J. Nicolaides, a Notary Public in and for the District of Columbia, personally appeared Maud E. Davis, defendant in the suit of Mark O. Davis vs. Maud E. Davis, now pending in the Circuit Court of Arlington County, Virginia, whose name is signed to the foregoing plea, and made oath that she has read and is familiar with the contents of said plea; that the matters and things therein stated as of her own knowledge are true and in so far as they are stated upon information and belief she believes them to be true.

35

Given under my hand and notarial seal this 31 day of March, 1928.

(Seal) PHIDIAS J. J. NICOLAIDES,
Notary Public.

My commission expires April 11, 1933.

A Copy. Teste.

Given under my hand this 24th day of July, 1929.

WM. H. DUNCAN,
Clerk.

By EDITH B. CORDER,
Deputy Clerk.

At a Circuit Court for the County of Arlington, Virginia, continued and held at the Court House thereof at 10 o'clock A. M., Tuesday, April the 17th, in the year of our Lord Nineteen Hundred and Twenty-eight.

Present: The Hon. Sam'l G. Brent, Judge.

In Chancery.

MARK O. DAVIS, Complainant,

vs.

MAUD E. DAVIS, Defendant.

Decree of Reference.

This cause coming on this day to be heard, upon the bill of complaint and the exhibits filed in connection therewith, including a certified copy of the marriage license, and certificate of the time, and place of the performance of said marriage by the person performing the ceremony, upon the original process issued herein, with sworn return of the personal service thereon endorsed, showing the due and proper service thereof upon the defendant, and upon argument of counsel;

And it appearing to the Court that the complain-
36 ant has proceeded regularly at rules and has properly matured this cause against the defendant, and that the same is now properly upon the active docket of this Court,

Upon consideration whereof, the Court doth now adjudge, order and decree that this cause be, and the same is now hereby referred to Homer R. Thomas, one of the Commissioners in Chancery of this Court, who shall ascertain and report whether or not this Court has jurisdiction to hear and determine this cause and whether or not a decree of divorce should be entered by this Court.

HOWARD W. SMITH,

Judge Designated by the Governor to Hold at Part of the April, 1928, Term of This Court, a Vacancy Having Occurred in the 16th Judicial Circuit by Reason of the Death of Hon. Sam'l G. Brent.

A Copy. Teste.
Given under my hand this 24th day of July, 1929.

WM. H. DUNCAN,
Clerk.

By EDITH B. CORDER,
Deputy Clerk.

Filed January 3, 1929.

In the Circuit Court of Arlington County, Virginia.

In Chancery.

MARK O. DAVIS, Complainant,

vs.

MAUD E. DAVIS, Defendant.

Commissioner's Report.

To the Honorable Howard W. Smith, Judge of the Circuit Court of Arlington County, Virginia:

By decree entered in the above entitled cause on the seventeenth day of April, 1928, the above cause was refered to the undersigned Commissioner in Chancery
37 to ascertain and report the matters and things therein set forth.

That a plea to the jurisdiction of this Court was filed and by stipulation of counsel it was agreed that the Commissioner should only ascertain the facts and the thought on questions raised in the plea to the jurisdiction filed by the defendant, and that no other matter shall be inquired into or reported under the decree of reference heretofore entered.

Your Commissioner has taken all of the testimony submitted by the Complainant and the Defendant and respectfully reports to the Court that in his opinion the Complainant is an actual legal bona fide resident of Arlington County, Virginia, and that the Court has jurisdiction to hear and determine this cause.

Respectfully submitted,

HOMER RANDOLPH THOMAS,
Commissioner.

A Copy Teste.
Given under my hand this 24th day of July, 1929.

WM. H. DUNCAN,
Clerk.

By EDITH B. CORDER,
Deputy Clerk.

Filed January 12, 1929.

In the Circuit Court of Arlington County, Virginia.

In Chancery.

MARK O. DAVIS, Complainant,

vs.

MAUD E. DAVIS, Defendant.

Exceptions to Report of Commissioner Homer R. Thomas.

Now comes the defendant, Maud E. Davis, and files these her exceptions to the report of Commissioner Homer Randolph Thomas filed in this cause on January 3rd, 1929, and for grounds of exception as shown by the evidence and exhibits filed in said cause, states the following:

38 1. That the plaintiff, Mark O. Davis, is not an actual bona fide resident of Arlington County, Virgina.

2. That the plaintiff has no bona fide residence in Arlington County nor was the matrimonial domicile ever in Arlington County, and that his presence in said county is and has been solely for divorce purposes in this case.

3. That the residence claimed by the plaintiff in Virginia is a fraud upon the court and being solely for divorce purposes this court has never acquired jurisdiction over the marriage status.

4. That at the time of the institution of the suit for divorce in this jurisdiction there was pending in the District of Columbia between him and his wife divorce proceedings and said proceedings are still pending in the Supreme Court of the District of Columbia and that by virtue of the matrimonial *res* being within the jurisdiction of the Supreme Court of the District of Columbia, said court has been passing orders in the said case during the pendency of this cause and has enjoined the plaintiff from taking his child out of the District of Columbia and the plaintiff during the pendency of this cause has filed petitions in the Supreme Court of the District of Columbia for reduction of alimony and other relief, as shown by exhibits introduced into evidence and filed with the report of the Commissioner.

5. That the finding of the commissioner as to residence

is contrary to the evidence in which four witnesses including the defendant have testified to the declarations of the plaintiff that he was in Virginia solely for divorce purposes.

MAUDE E. DAVIS,
Defendant,

By COUNSEL.

FRANK L. BALL,
CRANDAL MAUKEY,
Counsel for Defendant.

A Copy. Teste.
Given under my hand this 24th day of July, 1929.

WM. H. DUNCAN,
Clerk.

By EDITH B. CORDER,
Deputy Clerk.

Circuit Court for the County of Arlington, Vir-
39 ginia, continued and held at the Court House thereof at 10 o'clock A. M., Saturday, March the 16th, in the year of our Lord, Nineteen Hundred and Twenty-nine.

Present: The Hon. Howard W. Smith, Judge.

In Chancery.

MARK O. DAVIS, Complainant,

vs.

MAUD E. DAVIS, Defendant.

This cause coming on this day to be heard upon the bill of complaint and papers formerly filed and read, upon the report of Master Commissioner in Chancery, Homer Randolph Thomas, one of the Commissioners in Chancery of this Court, together with the depositions of Mark O. Davis, Forrest G. Steig, Catherine Lewis Heth, Neil Rex Collier, George L. Cruitt, E. Wade Ball, Harry K. Green and C. C. Carr filed and read as evidence for and in behalf of complainant, upon the depositions of Maud E. Davis, Helen C. Schultz, Fannie Partington, and Ida S. Elliott filed and read as evidence for and in behalf of the defendant and the sundry exhibits for and in behalf of complainant and de-

fendant filed with the said depositions, said report of the said Master Commissioner by consent of parties being limited under the special plea filed by the defendant to ascertain whether or not this court has jurisdiction to hear and determine this cause, upon the report of Howard Fields, Sheriff of this County submitted to the said Master Commissioner pursuant to a decree heretofore entered by this Court in divorce causes directing the said Sheriff to report as to the residence and domicile of parties in such proceedings, upon the deposition of the said Howard Fields, Sheriff as aforesaid, upon the motion filed in behalf of defendant to suppress the said deposition of the said Sheriff, upon the exceptions filed in behalf of defendant to the said report of the said Master Commissioner, and upon argument of Counsel. And the Court, after hearing argument of counsel for both complainant and defendant on the matters raised by the said motion to suppress the said deposition of the said Sheriff and the exceptions filed to the
40 report of the said Master Commissioner, took the papers in the cause, stating that after further consideration of them he would render his decision; and the Court, at a later date, after having maturely considered the pleadings, the depositions and exhibits therewith filed, the aforesaid motion to suppress the deposition of the said Sheriff, and the exceptions to the said report of the Master Commissioner, doth now adjudge, order and decree that the said motion to suppress the deposition of the said Sheriff, be and the same is now sustained, for the reason that neither counsel for the Complainant nor counsel for the Defendant had an opportunity to examine or cross examine the said Sheriff at the time of the taking of said deposition;

And the Court being of the opinion from the evidence, exclusive of the deposition of H. B. Fields, that the complainant is domiciled in and is and has been an actual bona fide resident of this County and State for more than one year preceding the institution of this cause, and that he, the said complainant, is now so domiciled and so residing in this County and State, and that this Court has jurisdiction of the subject matter and of the parties to this cause, doth now adjudge, order and decree that the said exceptions filed to the said report of the said Master Commis-

sioner be, and the same are now overruled, and that the said report be, and the same is now in all things ratified and confirmed.

And the Court doth now grant the defendant ten days from the rising of the Court within which to file such answer or other pleadings in this cause as she may wish.

And the Defendant having signified her desire to apply to the Supreme Court of Appeals of this State for an appeal from this decree, the Court without in any way passing upon the question as to whether or not this is an appealable decree, doth now suspend the operation of this decree for a period of thirty days, conditioned upon the defendant or someone acting for her entering into a suspending bond before the Clerk of this Court, within ten days from the rising of the Court, in the penalty of $100.00 with approved surety, conditioned according to law.

And this cause is continued,

41 HOWARD W. SMITH,
Judge.

A Copy: Teste.
Given under my hand this 24th day of July, 1929.

WM. H. DUNCAN,
Clerk.

By EDITH B. CORDER,
Deputy Clerk.

42 *Rule to Show Cause*

Filed April 16, 1935

* * * * * * * *

Upon consideration of the petition of the plaintiff filed in the above-entitled cause, and the points and authorities filed in support thereof, it is by the Court this 16th day of April, 1935,

ORDERED, That the defendant appear herein on or before the 29th day of April, 1935 and show cause, if any she has, why the prayers of the plaintiff's petition should not be granted, provided a copy of this rule be served upon the defendant at least two days before the return day hereof.

JAMES M PROCTOR
Justice.

Marshal's Return

Served a copy of the above rule on the above named Maude E Davis Defendant personally 4/16/35

JOHN B. COLPOYS,
U. S. Marshal in and for the Dist. of Columbia

By W P HAYS
Deputy U. S. Marshal

K.

43 *The Answer of Maude E. Davis to the Petition of Mark O. Davis for Reduction of Alimony*

Filed April 27, 1935

* * * * * * * *

Now comes the respondent and for answer to the petition of the said Mark O. Davis for reduction of alimony filed herein, respectfully shows to the court as follows:

1. This respondent admits that on October 29, 1925, when the plaintiff Mark O. Davis was awarded a divorce from bed and board, that she was granted the custody of her daughter Mary Suzanne and also that she was granted permanent alimony in the sum of three hundred dollars ($300) a month for her support and maintenance to be expended in her discretion for the maintenance of herself and her child. This respondent believes that her counsel Henry E. Davis, Esq. was awarded $1,250 as counsel fee but does not see the relevancy of that statement to any issue herein.

2. This respondent avers that the said Mark O. Davis did testify at said case that he was in receipt of an income of $13,800 per year from his profession as dentist but she avers that at that time she was familiar with his income and he was in receipt of an income of at least $30,000 and in addition thereto was the owner of premises No. 2810 Adams Mill Road, northwest, which he sold about five years ago for $38,000 cash and the plaintiff had then as now other large means consisting of bonds, stocks, and other

44 securities and ready money which she states upon information and belief to be very large. And this respondent avers that in the year before he started suit, namely, in March, 1924, he stated to this defendant that he

did not return more than one-third of his income to the Federal Government for taxation.

3. This respondent denies that the said Mark O. Davis ever became an actual bona fide resident of Arlington County, Virginia wherein he instituted a suit for an absolute divorce against this respondent on the ground of wilful abandonment and desertion, but she avers the fact to be that he never did acquire a residence in the legal sense in Arlington County, Virginia. She states the fact to be that he moved to Arlington County, Virginia less than a year after the divorce from bed and board, which was October 29, 1925, and he moved to Virginia October 15, 1926, and occupied a rooming house and then another rooming house for the sole purpose of acquiring a residence for divorce purposes while at the same time he kept his residence fully furnished at 2810 Adams-Mill Road, northwest, in the District of Columbia and did not sell the same until about five or six years ago. And while in his suit for divorce in Virginia he alleged that this respondent had deserted him on February 24, 1925, he was in fact living in the same house with her and her two children at 2810 Adams Mill Road, northwest until April 27, 1925, when he forced her to leave and she was unable to leave until the first installment of alimony was paid in a suit for divorce which he instituted in the District of Columbia Supreme Court on March 10, 1925. This respondent avers that in said suit for divorce which he filed in Virginia, she was served with a copy of the summons in District of Columbia in lieu of publication and which had no other effect than an order of publication, and that she in her proper person specially and for no other purpose than to file her plea to the jurisdiction of the court which set forth that neither she nor the said Mark O. Davis had ever been residents of Virginia but that his alleged residence was for the sole purpose of creating jurisdiction in the court to hear
45 and allow his suit for divorce, which was a fraud upon the Court and he was not a bona fide resident in contemplation of law. A copy of said plea to the jurisdiction is attached hereto, marked plaintiff's exhibit A. And the respondent on said plea to the jurisdiction testified and was corroborated by three witnesses that the said Mark O. Davis had declared that he had moved to Virginia

for the sole purpose of obtaining a divorce, and also it was in the record there that the said Mark O. Davis in the case of *Davis* vs. *Burton*, equity 47477 in the Supreme Court of the District of Columbia, in 1927 made an affidavit that at that time he was a resident of the District of Columbia, while at the same time his suit for divorce was pending in Virginia and notwithstanding there was no evidence but the denial of the said Mark O. Davis, the Court entered a decree granting him an alleged absolute divorce, although said court was entirely without jurisdiction to hear said case and although the domicile of matrimony was never in the State of Virginia, and this respondent avers that this said decree is not entitled to full faith and credit in the District of Columbia and this Honorable Court is not required to recognize said pretended decree and this respondent is entitled to show in this Court that the said Court had no jurisdiction to grant said decree and she has the right to contradict the allegations of said decree and finding of said Court which right is secured to you by numerous decisions of the Supreme Court of United States and by decisions of the Court of Appeals of the District of Columbia.

4. Answering paragraph 4 of said petition, this respondent avers that after entry of said decree in the Circuit Court of Arlington County, Virginia, the said Mark O. Davis undertook to reduce the alimony to $150 per month, and upon proceedings brought by this respondent he was adjudged in contempt of court by Mr. Justice Bailey, and he was forced to continue the payments of $300 per month to her, and that he took appeal from the order of Mr. Justice Bailey in your equity cause No. 43763 and the Court of Appeals affirmed the judgment of Justice Bailey which is shown in the case of Davis against Davis, 65 D. C. Appeals, p. [illegible], and in said case the Court of Appeals
46 referred to the fact that this respondent had set up by a special appearance in Virginia that the said Mark O. Davis was not a resident of the State but had fraudulently simulated a residence for the sole purpose of presenting a divorce case.

This respondent further states that since obtaining said fraudulent decree of divorce in Virginia the said Mark O. Davis on, to wit: October 27, 1933, entered into a pretended

marriage ceremony with one Bernice Smith in Alexandria, Virginia. This respondent avers that said pretended marriage is void and adulterous and that ever since said ceremony was performed said Mark O. Davis has been living with the said Bernice Smith in adultery at 4434 Garfield Street, northwest, and prior to said pretended marriage the said Mark O. Davis occupied the house 4434 Garfield Street, northwest, with the said Bernice Smith and her husband George O. Smith and travelled in Europe with said Bernice Smith and came back on the same boat with her in August, 1932 while the husband remained home, and that an affectionate relation existed prior to the trip to Europe between the said Mark O. Davis and Bernice Smith as this respondent is prepared to prove.

5. Answering paragraph 5 of the said petition, this respondent says that her said daughter Mary Suzanne did marry a young man named Sioussat on July 31, 1932 and he is at present employed by the American Trucking Association but does not get any annual salary but is paid by the week and his wages from May 21, 1934 to the present time were as follows: May 21, 1934, $18.75; a week; from May to July, $20.00 per week; from July to August, $22.00 a week; and from August to November $27.50 per week; and from November to date $35.00 per week, and the said Herbert Sioussat is very much in debt having been out of employment so long that he was about three thousand dollars ($3,000) in debt for rent, board and other expenses, and in order to enable her daughter to live, this respondent has been contributing to her an average of sixty dollars ($60)
47 a month and will have to continue such contribution, and being her only daughter and not having attained the age of eighteen years until January 15, 1935, this respondent feels that it is her duty to continue such contribution for the support of her said child; and this respondent calls attention to the fact that the said Mark O. Davis through Wilton J. Lambert, Esq. brought this identical motion asking for a modification of the decree of 1925 upon the ground that this respondent's daughter, said Mary Suzanne, had married and that the income of said Mark O. Davis had diminished, and after a full hearing this court decided on November 21, 1932 that the motion to modify the decree of 1925 should be denied.

This respondent also further calls attention to the fact that ever since the final decree of 1925 was entered in this cause the said Mark O. Davis has at stated intervals attempted to have it modified and in every instance he has been turned down by the court as will be shown by docket entries, beginning in the year 1926 and ending in 1932, in addition to the pending attempt.

6. Answering paragraph 6, this respondent says that it is untrue that at the time of the entry of the decree Mark O. Davis was earning but $13,800 a year, but at that time he had an income of at least $30,000 a year, and she avers on information and belief based upon reliable reports to her that for the past five years he has been specializing in dental surgery and straightening and regulating of teeth, and that his receipts from his profession have much increased and in straightening teeth his minimum fee is one thousand dollars and in some instances are known to exceed two thousand dollars for a single case, and this respondent avers that his statement about his net income was made to mislead the Court as this Court is interested in knowing what his gross income was and will not permit him to charge off against his income capital losses which he had been allowed to charge off in his income tax return and he has intentionally in his petition covered up his gross income during the years 1933 and 1934.

7. Answering paragraph 7 of the petition, this re-
48 spondent says that the only publicity that the said Mark O. Davis has had since 1925 has been brought about by himself in repeated attempts to have the alimony reduced and such publicity has in no way reduced his income, and this respondent says that in addition to the large income which he receives from his profession and his investments, which this respondent avers on reliable information and belief to be at least $30,000 a year, he is the owner of the house in which he is living, No. 4434 Garfield Street, northwest, with the title thereto in the name of said Bernice Smith, said house being of the value of at least $30,000, and this respondent avers that he purchased said house and is the owner thereof as neither the said Bernice Smith nor her husband had any money to buy such a house. In addition thereto, this respondent says that when he sold

the house on Adams Mill Road for $38,000, he had, after paying her for her dowry in said property and other expenses, at least the sum of $33,000 left which he still has, and she knows that he has a large amount of investments in stocks, bonds, and securities, but without the aid of court she is unable to show the exact amount thereof.

And now having fully answered said petition, this respondent prays that the said rule to show cause be discharged and the prayers of the said petition be denied.

MAUDE E. DAVIS

Maude E. Davis, being first duly sworn, states upon oath that she has read the answer by her above subscribed, and verily believes the facts therein stated to be true.

MAUDE E. DAVIS

Subscribed and sworn to before me this twenty-sixth day of April, A. D. 1935.

WILLIAM C. DE LACY
(Notarial Seal) *Notary Public, D. C.*

49 In the Supreme Court of the District of Columbia

Holding an Equity Court.

Equity No. 43763.

MARK O. DAVIS, Plaintiff,

vs.

MAUDE E. DAVIS, Defendant.

Affidavit of Mary Suzanne Davis Sioussat

* * * * * * * *

Mary Suzanne Davis Sioussat, being first duly sworn, states upon oath as follows:

That she is the only daughter of the said Mark O. Davis and Maude E. Davis, and that she lived with her mother until July 31, 1932 when she married at the age of fifteen a young man by the name of Herbert Sioussat; that ever since her marriage her mother has supported her out of the alimony that her mother was receiving and her mother has always supported her generously and has always been a devoted mother; that from the date of her marriage, July 31, 1932, her husband was only able to get employment the

first year at about fifty dollars ($50) a month, and from that time until last May only $18.75 a week, and only since last January has he received as much as thirty five ($35) a week which is his present wages, and he never has been in receipt of any salary as alleged.

That being out of employment so long, and because of the very small wages that her husband has always received, he has become deeply involved in the payment of rent and in the purchase of furniture and debts to his family and friends for borrowed money so that his indebtedness amounts to about three thousand dollars ($3,000) which he is paying off and they would not have enough to live upon but for the contributions of her mother who has been paying her out of the alimony an average of about sixty dollars ($60) a month; and that she depends upon her
50 mother's payments out of the alimony her mother is receiving as her mother has no other source of income.

Affiant further says that she knows that her father specializes in dental surgery and the straightening and regulation of teeth and does much surgical work and work of straightening teeth, and that he receives large fees for such work, and that his charges for straightening teeth are very high from a minimum of a thousand dollars a case and that he is always busy and she has passed by his office every day for the past several years and knows that he is always busy and earns a good income and that his professional standing is very high and his practice is very lucrative.

Further affiant sayeth not.

MARY SUZANNE DAVIS SIOUSSAT

Subscribed and sworn to before me this twenty-sixth day of April, A. D. 1935.

E. WILLARD HYDE
(Notarial Seal) *Notary Public, D. C.*

51 *Order Dismissing Petition to Vacate or Modify Decree*

Filed April 1, 1936

* * * * * * * * *

This cause came on for hearing on the petition of the plaintiff to vacate or modify the decree entered herein on

October 29, 1925, the answer of the defendant thereto, and the papers read and received in evidence, and, after having been argued by counsel for the respective parties, it is by the Court this 1st day of April, 1936,

ADJUDGED, ORDERED, and DECREED, that the petition of the plaintiff be, and it is hereby dismissed.

ALFRED A WHEAT,
Chief Justice.

From the foregoing decree the plaintiff, in open court, notes an appeal to the United States Court of Appeals for the District of Columbia, and the bond for costs on appeal is hereby fixed at $100.00, or deposit of $50.00 in cash in lieu thereof.

ALFRED A WHEAT,
Chief Justice.

Seen:
CRANDAL MACKEY
Atty. for defendant

Seen:
JOSEPH T. SHERIER
Atty. for plaintiff

52 *Objections and Exceptions*

Filed April 1, 1936

. . . . . .

1. The plaintiff objects and excepts to the action of the Court in dismissing his petition to vacate or modify the decree of October 29, 1925, on the ground that the decision of the Court of Appeals in the case of *Davis* v. *Davis*, 61 App. D. C. 48, is res adjudicata of the invalidity of the Virginia decree of divorce between the parties.

2. The plaintiff objects and excepts to the action of the Court in dismissing his petition to vacate on the ground that the Court of Appeals, in *Davis* v. *Davis, supra*, held that the Virginia decree upon presentation to this Court did not have the effect of annulling or vacating the decree of this Court for alimony, entered October 29, 1925.

3. The plaintiff objects and excepts to the action of the Court in holding that the emancipation of the daughter by marriage on July 31, 1932 was not a ground for reducing

the allowance made to the defendant by the decree of October 29, 1925 for the support and maintenance of herself and the then infant daughter of the parties.

4. The plaintiff objects and excepts to the action of the Court in refusing to give full faith and credit to the decree of the Virginia court, entered June 26, 1929, granting the plaintiff an absolute divorce from the defendant on the ground of her desertion of the plaintiff.

53 5. The plaintiff objects and excepts to the action of the Court in refusing to recognize and give effect under the doctrine of comity to the decree of the Circuit Court for Arlington County, Virginia, entered June 26, 1929, awarding the plaintiff an absolute divorce from the defendant on the ground of her desertion.

JOSEPH T. SHERIER
Attorney for Plaintiff

Memorandum

APRIL 2, 1936

Bond ($100.00) of plaintiff on appeal approved and filed.

54 *Assignment of Errors*

Filed April 2, 1936

* * * * *

The plaintiff assigns for review on appeal errors committed by the trial justice in the following particulars:

1. In holding that the decision of the Court of Appeals on the former appeal herein is res adjudicata of the question here presented.

2. In holding that the Court of Appeals on the former appeal herein decided that the Virginia decree of absolute divorce did not have the effect of annulling or vacating the decree of this Court granting the wife alimony.

3. In holding that the emancipation of the daughter of the parties by her marriage on July 31, 1932, furnished no ground for reducing the allowance made by the decree of October 29, 1925, for the support of the wife and daughter.

4. In refusing to give full faith and credit to the decree of the Virginia court entered June 26, 1929, granting the plaintiff an absolute divorce from the defendant, without alimony.

5. In refusing to recognize and give effect, under the doctrine of comity, to the decree of the Virginia court awarding the plaintiff an absolute divorce from the defendant without alimony.

6. In denying the prayers of plaintiff's petition to
55 vacate or modify the decree of October 29, 1925, and in refusing to vacate or modify such decree.

7. In holding that the absolute divorce granted the plaintiff from the defendant by the Virginia decree of June 26, 1929 did not when presented to this Court, relieve the plaintiff of further obligation to support the defendant or to comply with the decree of this Court of October 29, 1925.

8. In holding that the Virginia absolute divorce obtained by the plaintiff from the defendant did not furnish any ground for setting aside or modifying the decree of October 29, 1925, with respect to the maintenance by that decree awarded the defendant.

9. In entering the decree of April 1, 1936, denying the prayers and dismissing plaintiff's petition to vacate or modify the decree of October 29, 1925.

JOSEPH T. SHERIER
Attorney for Plaintiff

Service of a copy of the foregoing assignment of errors acknowledged this 1st day of April, 1936.

CRANDAL MACKEY
Attorney for Defendant

56 Supreme Court of the District of Columbia

Saturday, May 23, 1936

The Court resumes its session pursuant to adjournment, Mr. Chief Justice Wheat, presiding.

* * * *

Come now the parties hereto by their respective attorneys of record, and thereupon, the plaintiff by his attorney presents to the Court his Statement of Evidence taken at the trial of this cause, and prays that the same be signed and made of record, nunc pro tunc, which is hereby accordingly done.

ALFRED A. WHEAT,
Chief Justice.

57 *Designation of Record*

Filed April 2, 1936

The Clerk will please include in the transcript of record on appeal, the following:

1. Original bill of complaint, filed March 10, 1925.
2. Answer and cross bill of defendant, filed March 18, 1925.
3. Answer of plaintiff to cross bill, filed June 9, 1925.
4. Answer of cross defendant, filed June 9, 1925.
5. Decree entered October 29, 1925.
6. Petition of plaintiff to vacate decree of October 29, 1925, or to reduce the allowance of alimony, and exhibits thereto.
7. Rule to show cause issued thereon.
8. Answer of the defendant to petition to vacate decree or reduce alimony.
9. Order denying prayers of petition to vacate, and notation of appeal in open Court.
10. Order fixing bond for costs on appeal.
11. Assignment of errors.
12. Objections and exceptions of the plaintiff, filed April 1, 1936, to the action of the Court in dismissing the petition of the plaintiff to vacate or modify the decree of October 29, 1925.

58 13. This designation of record.
14. Memo of approval and filing of cost bond.

JOSEPH T. SHERIER
Attorney for Plaintiff

Service of a copy of the foregoing designation of record acknowledged this 1st day of April, 1936.

CRANDAL MACKEY
Attorney for Defendant

59 Supreme Court of the District of Columbia

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 58, both inclusive, to be a true

and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 43763 in Equity, wherein Mark O. Davis is Plaintiff and Maud E. Davis is Defendant, as the same remains upon the files and of record in said Court.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 3rd day of June, 1936.

FRANK E. CUNNINGHAM,
(Seal) *Clerk.*

By CHAS. B. COFLIN,
Assistant Clerk.

60 In the Supreme Court of the District of Columbia

HOLDING AN EQUITY COURT.

Equity No. 43,763.

MARK O. DAVIS, Plaintiff,

vs.

MAUDE E. DAVIS, Defendant.

To:

Crandel Mackey, Esquire,
Attorney for Defendant.

Dear Sir:

You are hereby notified that the statement of evidence in the above-entitled cause, a copy of which is hereto attached, has this day been filed in the Supreme Court of the District of Columbia, and that the same will be submitted to the Court for its approval on May 4, 1936.

JOSEPH T. SHERIER,
Attorney for Plaintiff.

Service of a copy of the foregoing notice and statement of evidence acknowledged this 3rd day of April, 1936.

CRANDEL MACKEY,
By I. D. SORRELL,
Attorney for Defendant.

61 In the Supreme Court of the District of Columbia

HOLDING AN EQUITY COURT.

Equity No. 43,763.

MARK O. DAVIS, Plaintiff,

vs.

MAUDE E. DAVIS, Defendant.

Statement of Evidence

Be it remembered that the above-entitled cause came on for hearing before Mr. Chief Justice Wheat on March 30, 1936; Joseph T. Sherier appearing on behalf of the plaintiff, and Crandal Mackey representing the defendant.

And thereupon, the plaintiff, to maintain the issues upon his part joined, offered evidence as follows:

The petition and motion of October 4 and 5, 1932, in which the plaintiff prayed that the decree of October 29, 1925, be vacated on the ground that the daughter of the parties had married on July 31, 1932; that the defendant had remarried, and that the decree of divorce granted by the Circuit Court of Arlington County, Virginia relieved the plaintiff of further obligation to pay alimony under the decree of this Court. The answer of defendant denied her remarriage. No testimony was offered by either party, the matter having been heard on the pleadings. The petition of the plaintiff was denied by order entered in the cause by Mr. Justice Luhring.

There was received in evidence the decree of this Court, dated October 29, 1925, granting the husband a limited divorce from the defendant.

Thereupon plaintiff offered in evidence so much of the answer of the defendant to the instant petition as admits the marriage of the daughter of the parties on July 31, 1932, and that she is now living with her husband. Attention of the Court was thereupon called to the provi-

62 sions of the general laws of Virginia, conferring jurisdiction upon the Circuit and Corporation Courts of that State in suits for divorce. Also the provision of the general laws of Virginia, authorizing service upon absent defendants by publication or personal service upon such

defendants without the jurisdiction in lieu of publication. Thereupon a certified copy of the proceedings in the Circuit Court of Arlington County, Virginia in the case of Mark O. Davis v. Maude E. Davis was received in evidence. So much of the answer of the wife to the instant petition as admits her special appearance in the Virginia cause and participation in the hearing had upon her plea to the jurisdiction was received in evidence.

There was received in evidence, under the hand and seal of the Clerk of the Corporation Court of Alexandria, Virginia, the marriage record of the plaintiff, Mark O. Davis, to Bernice A. Smith, on October 27, 1933, such record showing that this marriage was performed in the State of Virginia. Also so much of the answer of the defendant to the instant petition as alleges the marriage of plaintiff and Bernice A. Smith in Alexandria, Virginia on October 27, 1933.

The attention of the Court was thereupon directed to the Act of August 8, 1935, which authorizes the granting of an absolute divorce in this jurisdiction on the ground of desertion.

Thereupon plaintiff offered, and there was received in evidence so much of the defendant's reply to plaintiff's motion to strike her answer to the instant petition as alleges that the Court of Appeals did not, on the former appeal, pass upon the validity of the Virginia decree of divorce. Whereupon the following occurred:

"Mr. Mackey: Is that a paper you are offering?

The Court: That is conceded, I believe.

Mr. Sherier: Yes, sir. That is conceded.

Mr. Mackey: The same objection, if your Honor
63. please. I cannot help making these objections.

The Court: But now, do you concede it or don't you? Will you answer that question? Do you concede that the Court of Appeals has not passed upon the validity of this decree, or don't you concede that?

Mr. Mackey: That is answered by the opinion of the Court, that it is not necessary to pass on it in this case, but I am objecting now to him offering a part of a paper in evidence. May I state the rule to your Honor? You can

cross examine a witness on a part of a paper as long as you want to, but the minute you offer part of it in evidence and it is admitted, that is reversible error, because I reversed a sentence here of eight years, in the Court of Appeals in Virginia, on that very ground. They had used a part of the paper and offered it in evidence. The Court said if he had stopped with the cross examination of the witness on that part that would have been all right, but the minute he put in evidence any part of a paper, it was reversible error. So I want to except to the admission of a part of a paper.

Mr. Sherier: I now understand that it is admitted by counsel that the Court of Appeals did not pass upon the validity of the Virginia divorce. Is that right?

Mr. Mackey: The Court of Appeals answers that in the opinion, that it was not essential in passing on a motion to reduce the alimony.

Mr. Sherier: Do you concede it?

Mr. Mackey; And further, although they raised that question in the Court of Appeals and raised it below, the Court of Appeals ignored that. That is what I say.

The Court: I do not believe there is any use in taking up time. Mr. Mackey will not concede it.

Mr. Sherier: I suppose I had better go on and introduce it.

The Court: Yes, I suppose so. That is one of the things I would like to know, what they did pass on and did not pass on."

64 Thereupon plaintiff offered, and there was received in evidence the following excerpts from the defendant's brief in the Court of Appeals.

" 'In order to deny the petition, it was not necessary for the court to pass on the validity of the Virginia decree because if the husband had obtained the decree for absolute divorce in the Supreme Court of the District of Columbia in the first instance, and the allowance was made the wife, the only ground on which the decree could be modified or vacated would be on a showing that the husband's income had decreased or that the wife was no longer in necessitous or dependent circumstances.'

'The appellant's brief is devoted solely to the question of the validity of the Virginia decree which has nothing to do with the case. There is not a thing in the record to show that the Virginia decree had any bearing on the decision of Justice Bailey and he could have held it valid both in Virginia and the District of Columbia, and yet refused to modify the decree of 1925 as to alimony.'

'There is not a word in the record showing that counsel for the wife relied upon any cases or cited any cases relative to the validity of the Virginia decree, and the frequent references in the appellant's brief that counsel for the wife relied upon certain cases (Appellant's Brief, p. 11, 13, and 15) are merely part of an effort to build up a man of straw, exclusive of the record, and have the court pass on and validate the Virginia decree, which is not essential to the decision of the case, and could not be passed upon until after a mass of testimony is taken.'

'In conclusion it is submitted that the appellant's brief has no bearing on the decision of Justice Bailey, and that there is nothing in the record to show that the decision was based on the question as to whether the Virginia decree was good or bad, and since an absolute divorce in the District of Columbia would not in itself disturb the alimony granted the wife, without some grounds being shown other than the decree, the decision of the Virginia court could not affect the question and the decree could not be modified without some showing of change in the faculties of the parties.'

'The decree of the Supreme Court of the District of Columbia was only a decree of divorce from bed and board, but if it had been an absolute decree of divorce in the District of Columbia, it could not be disturbed as to alimony without a showing of a change in the circumstances and finances of the plaintiff or defendant. If it would not be disturbed here without such showing, it certainly would not be disturbed here merely by showing a Virginia decree of divorce.'

'This court is in the same position as the chancellor who heard the case below, in this, that there is nothing in the record to show any change in the circumstances of the

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parties to justify reduction of the alimony, and the decree in Virginia has no bearing on the matter, because the same decree obtained here would have no bearing on the matter. Unless a change in the husband's ability to pay or the wife's circumstances appeared in the hearing and justified modification on that ground, the decree for alimony could not be modified.' "

Thereupon the plaintiff offered, and there was received in evidence the memorandum opinion by Justice Bailey, denying the plaintiff's motion to strike defendant's answer to the instant petition, as follows:

"I see no reason to change my views, as expressed in my memorandum opinion filed in this case on July 26, 1929. That opinion was based upon the ground that the wife had submitted the question of the domicile of the husband to the Virginia Court, and that ordinarily a decree may not be attacked upon the ground of perjury on the part of the witness. She did not, however, submit the merits of the case to that court. Now the question is whether the matrimonial domicile of the parties was in that state. The
66 decree of that court, therefore, is not res adjudicata upon the latter question nor upon the merits of the case."

Thereupon plaintiff offered and there was received in evidence an exemplified copy of the Virginia decree of absolute divorce in favor of plaintiff.

Counsel for plaintiff admitted that there had been no substantial change in the financial condition of the plaintiff since the signing of the decree of October 29, 1925.

Thereupon the attention of the Court was directed to the fact that no evidence as to the validity of the Virginia decree was offered on the two previous hearings of the petitions to vacate.

The plaintiff having announced the close of his case, the Court asked counsel for defendant if he desired to offer any testimony to which counsel replied that he wanted to offer the defendant and three witnesses who would testify that plaintiff went to Virginia for the sole purpose of getting a divorce from the defendant, and that he never became an actual bona fide resident of that State, and also that the

aminer who took the testimony on the issue presented by efendant's plea to the jurisdiction of the Virginia court ted as judge and jury on the admissibility and inadmis- bility of evidence. Thereupon counsel for plaintiff ad- sed the court that he would admit that defendant's wit- esses, if present, would so testify, but that he would ntend that such testimony was incompetent.

The defendant did not produce any witnesses or offer any idence other than the admission of plaintiff that de- ndant's witnesses, if present, would testify as above ated.

Thereupon the following occurred:

"The Court: Well, of course there is a conflict betwe- is Bloedorn case and this Davis case. There is no doubt out that. In the Bloedorn case they concede the Virginia cree did operate to do away with the provisions of the istrict decree. In this Davis case they hold that it did not."

"The Court: And if this case came before me with- out this decision, that is one thing, but it has been fore the Court of Appeals and that is what the Court Appeals held—the plaintiff's prayer is rested solely on e decree entered in Virginia.

"The Court: So I am going to deny this. I hope you te it up to the Court of Appeals.

Mr. Sherier: Won't your Honor permit me to file a short morandum on that one point?

The Court: No. Mr. Sherier. I have given it the most eful and patient attention. I know that the Bloedorn e seems to be inconsistent with this, yet the Court of peals in this case have said that a Virginia decree—that in substance,—that the Virginia decree did not operate.

Mr. Sherier: If your Honor please, there is one further stion that I have not touched upon, and that is the ques- of comity. Is your Honor familiar with the very recent of Atkinson vs. Atkinson?

he Court: I think so.

r. Sherier: In which the Court said a Maryland de- was entitled to be recognized on the ground of comity,

and the Court of Appeals has not passed upon that question in this case.

The Court: That is the best I can do for you."

ALFRED A. WHEAT,
Chief Justice.

May 23, 1936.

Settled by counsel this — day of April, 1936.

.....
Attorney for Plaintiff.

.....
Attorney for Defendant.

Endorsed on cover: District of Columbia Supreme Court No. 6745. Mark O. Davis, Appellant, vs. Maude E. Davis. United States Court of Appeals for the District of Columbia. Filed June 3, 1936. Moncure Burke, Clerk.

[fol. 59] Thursday, January 7th, A. D. 1937.

No. 6745

MARK E. DAVIS, Appellant,

vs.

MAUDE E. DAVIS

The argument in the above entitled cause was commenced by Mr. Joseph T. Sherier, Attorney for appellant. (Mr. Justice Robb not sitting.)

[fol. 60] Friday, January 8th, A. D. 1937.

No. 6745

MARK O. DAVIS, Appellant,

vs.

MAUDE E. DAVIS

The argument in the above entitled cause was continued by Mr. Joseph T. Sherier, attorney for appellant, and was continued by Mr. Crandal Mackey, attorney for appellee, and was concluded by Mr. Joseph T. Sherier, attorney for appellant. Each side was allowed ten minutes additional in argument. (Mr. Justice Robb not sitting.)

[fol. 61] UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 6745

MARK O. DAVIS, Appellant,

vs.

MAUDE E. DAVIS

Appeal from the District Court of the United States for the District of Columbia

Joseph T. Sherier, of Washington, D. C., for appellant.
Crandal Mackey, of Washington, D. C., for appellee.

Before Martin, Chief Justice, and Van Orsdel, Groner, and Stephens, Associate Justices

Decided August 9, 1937

MARTIN, Chief Justice:

An appeal from an order of the United States District Court for the District of Columbia, dismissing a petition of the plaintiff, now appellant.

It appears that on March 10, 1925, Mark O. Davis and Maude E. Davis were husband and wife and were domiciled in the District of Columbia; that there were two living children of their marriage, a son, Mark O. Davis, Jr., then aged 12 years, and a daughter, Suzanne, then aged eight years; that on that day the husband as plaintiff filed a bill of complaint against his wife in the district court for the District of Columbia praying for a divorce a mensa et thoro from her upon charges of extreme cruelty; that the wife having been duly summoned filed an answer and cross-bill in the case denying the charges made against her by her husband, and charging him with extreme cruelty and with adultery, praying for a divorce a vinculo matrimonii and custody of the children; that the charges were denied by answer of the husband; that on October 29, 1925, the district court upon evidence dismissed the cross-bill of the wife, granted a divorce a mensa et thoro to the husband, awarding the custody of the minor son to him and to the wife the custody of the minor daughter, and ordering the husband to pay the tuition charges for the daughter and to "pay to the defendant the sum of $300 per month for the maintenance of herself and their said daughter, Suzanne."

No exception or appeal was taken by either party from the decree of the court relating to the divorce prayed for by each, or to the award of alimony for the wife.

However, after the lapse of more than four years from the date of the foregoing decree, to wit on December 30, 1929, the husband filed a petition in the district court in the same case, alleging that subsequent to the entry of the decree therein he had become an actual bona fide resident of the State of Virginia and that in a suit filed by him against his wife in the Circuit Court of Arlington County in that State, he had by lawful proceedings been awarded [fol. 62] a decree granting him a divorce a vinculo matrimonii from his wife, and that the court in the same decree had awarded to his wife the custody of their minor daughter, Suzanne, subject to a right of the husband to have her custody at stated periods, and had ordered the husband to pay to the wife the sum of $150 per month for the education, support and maintenance of Suzanne, without however requiring the husband to pay any sum for the maintenance of the wife.

The petitioner prayed the district court to set aside its order of October 29, 1925, or to so modify it as not to require him to pay any sum whatsoever to his wife for her maintenance, but to provide solely for the payment of a reasonable sum to her for the maintenance and support of his daughter Suzanne, and for the court to so reform its order as to make the provisions thereof conform to those of the final decree of the Circuit Court of Arlington County, Virginia, above referred to.

On May 12, 1930, the foregoing petition of the husband was heard by the district court. No evidence was introduced by either party. The husband based his petition solely upon the Virginia decree. The district court denied the petition, whereupon an appeal was taken by the husband to this court.

A proper understanding of this case requires a review of our opinion upon this appeal reported in Davis v. Davis, 61 App. D. C. 48; 57 F. (2d) 414, parts of which we quote literally in the following opinion. We said:

"In our opinion this prayer was rightly denied. Chapter 22 of the Code of Laws for the District of Columbia (D. C. Code 1929, T. 14, Ss 72, 73), contains the following sections:

" 'Sec. 977. If the divorce is granted on the application of the husband, the court may, nevertheless, require him to pay alimony to the wife, if it shall seem just and proper.

" 'Sec. 978. After a decree of divorce in any case granting alimony and providing for the care and custody of children, the case shall still be considered open for any future orders in those respects.' "

We said:

"Therefore, according to the statutes of the District of Columbia, the lower court, after passing the decree of divorce in the case, retained jurisdiction of the parties and the cause with authority to enter further and additional orders therein respecting the alimony of the wife and the care and custody of the minor daughter. The court accordingly was invested with authority to continue and enforce its orders already entered in these respects. The removal of appellant's residence to the State of Virginia, even if lawfully accomplished, cannot invest the courts of that state with authority to annul or supersede such jurisdiction."

We also quoted as follows:

"'In order to avoid conflict between tribunals of co-equal authority, the rule has been formulated, and so far as we know universally respected, that the court first acquiring jurisdiction shall be allowed to pursue it to the end, and that it will not permit its jurisdiction to be impaired or subverted by a subsequent resort to some other tribunal.'"

The foregoing decision was cited with approval by this court in the later case of Frazier v. Frazier, 61 App. D. C. 279; 61 F. (2d) 920, wherein we said:

"It is also settled law that the authority of the court first taking control of the subject-matter of litigation continues until the matter is finally and completely disposed of, and that no court of co-ordinate authority is at liberty to interfere with its action. (Citing Davis v. Davis, supra, and other cases.) In Peck v. Jenness, 7 How. 612, 12 L. Ed. 841, the court states the rule as follows: 'It is a doctrine of law too long established to require a citation of authorities, that, [fol. 63] where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court; and that, where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court.'"

Nevertheless the husband on April 16, 1935, a date more than 9 years after the entry of the first decree of the district court aforesaid, and more than 3 years after our decision in Davis v. Davis, supra, filed a second petition in the same case in the district court praying the court to set aside or modify its decree of October 29, 1925. In this petition three grounds were set out, first, the Virginia divorce which was set out in the previous petition, second, the fact that since the date of the last hearing the daughter Suzanne had been married and was no longer living with her mother, and, third, that the income of the petitioner had been greatly diminished since the last hearing and the amount of the allowance should be reduced accordingly.

The district court dismissed this petition, whereupon the present appeal was taken.

As already stated the petition which is now upon appeal prayed the district court (1) to vacate its decree of October 29, 1925, or (2) to modify the terms of that decree respecting the amount of alimony chargeable thereunder. In our opinion the first contention is without merit in this case. The decree of the district court preceded the decree of divorce granted by the Virginia court by a number of years, and under the provisions of the faith and credit clause of the Constitution of the United States (Const. Art. 4, Sec. 1) the Virginia court was bound to give full faith and credit to the judicial proceedings of the district court, including the alimony proceedings in question. Yarborough v. Yarborough, 290 U. S. 202. Both Mrs. Davis and Suzanne were residents and domiciled in the District of Columbia at the time of the hearing and decision of the case of Davis v. Davis, supra. Neither one ever became a resident of the State of Virginia. Mr. Davis likewise was a resident and was domiciled in the District at that time. He alleges that he afterwards became a resident of the State of Virginia and secured a divorce there. In our opinion, however, the courts of that state would not possess authority to modify or reverse the decision of the courts of the District of Columbia in matters over which when rendered, they had jurisdiction by law.

It is contended that the decision of this court in the case of Bloedorn v. Bloedorn, 64 App. D. C. 199; 76 F. (2d) 812, contradicts these statements. The cases, however, are distinguishable upon the facts. The decree entered in the district court in the Bloedorn case was not a decree of divorce for either of the parties, but was one for maintenance of the wife under sec. 980 of the D. C. Code. The case was one wherein equity would have had jurisdiction to grant maintenance as an independent relief, and such jurisdiction was not superseded by sec. 980, supra. The maintenance provided for the wife in that case by the district court was based in part upon the consent of the parties. At the trial of the Bloedorn case in the State of Virginia, Mrs. Bloedorn appeared without objection as a party without questioning in any manner the jurisdiction of the court. In fact through-
[fol. 64] out the proceedings that followed Mrs. Bloedorn at no time questioned the jurisdiction of the court over her as a party or over the cause.

The decree in the Davis case was not by consent, but was a decree upon a contested divorce issue. In the Virginia divorce case brought by Mr. Davis she denied the jurisdiction of the Virginia court and specially appeared for the express purpose of raising that question and for no other purpose. Her contention was denied by the Virginia court to which ruling she excepted.

It was not the intention of this court in its Bloedorn decision to overrule its repeated decisions in the Davis case above set out. No reference was made in the Bloedorn case in the Virginia court or in this court of our decisions in the Davis cases.

We therefore hold that the decree in the Davis case granting alimony to Mrs. Davis, while subject to modification by the district court was not subject to be vacated by the Virginia court, and that our prior decisions entered in this case have established the law of the case which should not be departed from in the manner sought by appellant.

In respect to the second part of appellant's contention, namely his request for a reduction of the amount granted by the district court as alimony, we think that the lower court should reconsider its decision upon this subject. It is conceded that the allowance of $300 per month first granted to Mrs. Davis was for her own maintenance and for the maintenance of her daughter, Suzanne. Since that time and since the last hearing of this case in this court, the daughter has been married and is no longer living with her mother. The father is not responsible for the maintenance of his daughter after marriage. This fact should be taken into consideration in determining the proper amount of alimony that may be awarded to Mrs. Davis. Moreover the evidence tends to show that the amount of income of Mr. Davis has been greatly reduced since the former allowance was made. A reconsideration of the amount of the maintenance granted to Mrs. Davis may rightly be considered. It is provided in sec. 978 of the D. C. Code that after a decree of divorce in any case granting alimony and providing for the care and custody of children the case shall still be considered open for any future orders in those respects. The jurisdiction of the court to consider the matters which are above suggested plainly appears.

We therefore sustain the decision of the lower court respecting its jurisdiction in the present case, but inasmuch

as the record discloses the question of jurisdiction was the chief question discussed in the lower court we remand the case for further consideration in respect to any modification in the amount of the alimony granted to Mrs. Davis which the court in the exercise of its discretion may find proper and right.

Remanded.

Mr. Justice Stephens dissents.

Mr. Justice Van Orsdel took no part in the decision of this case.

[fol. 65] IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, APRIL TERM, 1936

No. 6745

MARK O. DAVIS, Appellant,

vs.

MAUDE E. DAVIS, Appellee

MOTION FOR REHEARING

The appellant respectfully moves the Court to grant a rehearing in this cause, upon the ground that the decision, with respect to the faith and credit to be accorded the Virginia decree of divorce, is in conflict, not only with decisions of the Supreme Court of the United States, but with those of this Court.

The Supreme Court and this Court have repeatedly held that where the parties are living apart because of such misconduct on the part of one as would justify a judicial separation in favor of the other, or where they are living apart by virtue of a judicial separation, the innocent party may acquire a new residence sufficient to support an action for divorce.

Thus, in Markham v. Markham, 61 App. D. C. 332, and in Rollins v. Rollins, 60 App. D. C. 305, this Court said: "Undoubtedly the wife may establish a different domicile from that of her husband for purposes of divorce. Williamson v. Osenton, 232 U. S. 619. And this right is absolute whenever it is necessary or proper that she should do so."

In Barber v. Barber, 21 How. 582, 594, the Supreme [fol. 66] Court stated: "So when the parties are already living under a judicial separation the domicile of the wife

does not follow that of the husband." The same principle was announced in Williamson v. Osenton, supra.

The appellant, having been granted a judicial separation from the appellee by the decree of October 29, 1925, was, under the authorities just cited, free to establish a new domicile. That he established such a new domicile is shown by the decree of the Virginia court, rendered after the question of the bona fides of his residence in that state had been litigated in a proceeding inaugurated by the appellee and in which she participated by producing evidence. Although the appellee, in her answer to the petition filed in the court below, alleged that the appellant was not a bona fide resident of Virginia, she offered no proof in support of that contention, notwithstanding she was afforded an opportunity so to do. It would seem, therefore, that the question of the bona fides of the appellant's residence in Virginia is beyond dispute.

In the opinion announced August 9th, 1937, this Court points out that the decree of the court below preceded the decree of the Virginia court by a number of years and that, under the constitutional provision, the Virginia court was bound to give full faith and credit to the judicial proceedings in the District court, including the matter of alimony. It must be admitted that the proceeding in the Virginia court was entirely different from that in the court below. In the latter court, the action was not to dissolve the marital relation between the parties, but merely sought a judicial separation. The Virginia proceeding was directed to the dissolution of the marriage, and the decree entered by that court accomplished that purpose. Furthermore, it does not appear from the record that the decree of the court below was presented to the Virginia court in the manner [fol. 67] provided by law, with the view to having that court extend to it full faith and credit as required by the Constitution.

This Court, in Bloedorn v. Bloedorn, 64 App. D. C. 199, ruled that in order for a judgment of another state to be given the faith and credit required by the Constitution, it must be presented to the court asked to accord it such recognition. There, it was said: "Judicial notice of such a decree in a federal court must be requested, since it amounts to a dispensation from the production of evidence, and when so requested and assumed, it may be disputed.

Wigmore Evidence, pars. 2567, 2568. It was open to the husband *at any time* after obtaining his decree in Virginia to bring it into the District court with a petition to vacate the decree for maintenance because of the subsequent dissolution of the marriage status it was intended to maintain."

The fact that the decree of the court below in the separation proceeding preceded the Virginia decree granting an absolute divorce, does not, it is believed, deprive the Virginia decree of any of its validity or effect. Obviously, the decree dissolving the marriage could not have been rendered prior to that granting a judicial separation. In the Bloedorn case, the decree of the lower court was entered in April, 1931, while the Virginia decree of divorce in favor of the husband was not entered until November, 1933; yet this Court did not hesitate to hold that the Virginia decree, when properly presented to the lower court, of its own force vacated the decree for maintenance, which had until then preserved the marital status.

The case of Yarborough v. Yarborough, 290 U. S. 202, does not support the ruling of the Court for the reason that there the judgment of the Georgia court was specially pleaded and relied upon in bar of the proceeding in the [fol. 68] South Carolina court; and the Supreme Court ruled that the Georgia judgment was entitled to receive in the South Carolina court the same faith and credit accorded it in the courts of Georgia.

In the opinion, the Court notes the fact that Mrs. Davis and the daughter, Suzanne, were both residents and domiciled in the District of Columbia and never became residents of Virginia. A like state of facts was presented in the Bloedorn case, supra. Neither Mrs. Bloedorn nor her daughter ever became residents of Virginia. That fact, however, did not prevent this Court from giving effect to the Virginia judgment obtained by Bloedorn. The Court also notes that Mr. Davis was a resident and domiciled in the District at the time of the filing of his suit for a separation. The same is true of Dr. Bloedorn at the time the suit for maintenance was filed against him in the lower court. Notwithstanding these facts, which appear to be identical, this Court, in the Bloedorn case, upheld the Virginia decree and here strikes it down as not entitled to recognition in the local courts. If the court of Virginia does

not possess authority to modify or reverse the decision of the court below in this case, in respect of matters over which, when rendered, it had jurisdiction by law, then it must follow that the court of Virginia had no greater power or authority in the Bloedorn case. Yet, this Court held in the latter cause that the Virginia court had such authority.

It is said in the opinion that Dr. Davis alleged that he became a resident of the State of Virginia. He not only alleged the fact, but proved it by properly presenting the judgment of the court of that state, rendered after a contest between the parties; and no evidence was offered by appellee of any fact that tends in the slightest degree to invalidate that judgment.

[fol. 69] The opinion seeks to distinguish the Bloedorn case from the instant proceeding on the ground that the former was a suit for maintenance, while the latter involved a proceeding for a limited divorce. It is difficult to appreciate the distinction, since in both cases the decree preserved and maintained the marital status of the parties and made allowance to the wife and child for their support and maintenance apart from the husband. Barber v. Barber, 21 How. 582, and Van Cleaf v. Vurns, 118 N. Y. 549. To say the least, it would be an unusual, if not illegal, order that allowed a wife maintenance or equivalent alimony while living with her husband. It is, of course, only in cases where he is living apart from the wife and failing to provide for her that maintenance is granted. Marschalk v. Marschalk, 45 App. D. C. 455, 457. In the instant case, the Court below, by its decree, authorized the appellant to live apart from his wife, but required him to maintain and support her. In principle and fact, there would seem to be no sound distinction between the two cases. The fact, noted in the opinion, that the decree awarding the maintenance was in part based upon the consent of the parties does not change the character or quality of the decree. It was the judgment of the court just as much as if it had been entered after contest.

The opinion seeks to distinguish the Bloedorn case from the instant cause upon the ground that Mrs. Bloedorn, without questioning the jurisdiction of the Virginia Court, contested the cause on its merits, while in the instant case, Mrs. Davis merely contested and tried out in the Virginia court

the issue of the jurisdiction of that court. It is pointed out that she excepted to the action of the court in denying her contention. It appears from the record that she did not appeal from the decision of the court, but abandoned the proceeding. It would seem, therefore, that the judgment [fol. 70] of this Court proceeds upon the theory that Mrs. Davis, not having contested the merits of the cause in the Virginia court, was entitled to do so in the court below, and that the Virginia judgment on the merits was not binding upon her. This view ignores two important facts, the first of which is that, although afforded the opportunity in the trial court, Mrs. Davis offered no evidence tending to vitiate the Virginia decree, either on the question of the jurisdiction or the merits. The second point is that this Court has apparently failed to give effect to the ruling of the Supreme Court in Baldwin v. Iowa State Travelling Men's Asso., 283 U. S. 522. There, it was held that where a defendant specially appeared and, by proper plea, challenged the jurisdiction of the court, and after hearing, the issue was found against him, he could not then abandon the proceeding and thereafter collaterally attack the judgment in a suit brought thereon in another jurisdiction. The court pointed out that the defendant in such situation had two courses open to him; he might decline to go into the foreign court, in which event when suit was brought upon its judgment in another jurisdiction he could contest the jurisdictional question. On the other hand, he might go into the foreign court, contest the question of jurisdiction and, if adversely decided, prosecute an appeal from the judgment.

Here, as in the Baldwin case, Mrs. Davis elected to appear in the Virginia court and contest its jurisdiction. That issue having been decided against her, she abandoned the proceeding, precisely as was done by the defendant in the Baldwin case. The Supreme Court held that the judgment on the question of jurisdiction was binding and could not be collaterally attacked. The rule thus announced is believed to be controlling here.

[fol. 71] On the point as to whether the prior decision of this Court established the law of the case, the Court is respectfully referred to the memorandum heretofore filed herein by appellant.

The cases of Frazier v. Frazier, 61 App. D. C. 279, and Peck v. Jenness, 7 How. 612, cited in the opinion, are be-

lieved to be clearly distinguishable. In the former, the wife did not appear in the Virginia proceeding for any purpose, and the trial court found that the husband, at the time of the filing of his bill in Virginia was, and continued to be to the date of the trial, a resident of the District of Columbia. That no final decree of divorce had been entered by the Virginia court is shown by the fact that the trial court enjoined the husband from proceeding further with his suit therein.

The latter case involved a conflict of jurisdiction between a state and federal court sitting in the same state. The state court had obtained jurisdiction of personal property by attachment, which under state law created a lien thereon. Later the defendants were adjudged bankrupts by the federal court. Their trustee in bankruptcy intervened in the proceeding in the state court, set up the discharge of the defendants by the bankruptcy court, and claimed the property attached. The bankruptcy act expressly saved and preserved any liens valid by the laws of the state. It was held that as the state court had first obtained jurisdiction and by its process had impressed a valid lien upon the property, it should be permitted to proceed to final judgment. The facts clearly demonstrate the inapplicability of that decision to the instant case.

In the instant case, the bill filed by the husband in the court below sought a judicial separation or limited divorce on the ground of cruelty. It did not seek, and the court below was without power on the allegations thereof, to have [fol. 72] entered a decree dissolving the marital relation existing between the parties. Such a decree could then have been awarded only on the ground of adultery. In other words, the court below lacked jurisdiction to award the husband an absolute divorce on his bill. On the contrary, it is admitted that the bill filed by the husband in the Virginia court did seek a dissolution of the marriage on the ground of the wife's desertion, a cause not then recognized in the District of Columbia as a ground for absolute divorce. On proof of the allegations of his bill, the Virginia court had jurisdiction and was authorized to enter a decree dissolving the marriage. The causes of action and the relief obtainable and granted in the two cases being entirely different, the rule announced by this Court herein and in Frazier v. Frazier, supra, and that applied by the Supreme Court in Peck v. Jenness, is not controlling.

The true rule in such circumstances has repeatedly been announced by the Supreme Court to be that the doctrine of concurrent jurisdiction of courts is confined in its operation to instances where both suits are substantially the same; where there is substantial identity in the rights asserted and the relief sought.

Thus, in Buck v. Colbath, 3 Wall. 334,345, it was stated:

But it is not true that a court, having obtained jurisdiction of a subject-matter of a suit, and of parties before it, thereby excludes all other courts from the right to adjudicate upon other matters having a very close connection with those before the first court and, in some instances, requiring the decision of the same questions exactly.

In examining into the exclusive character of the jurisdiction of such cases, we must have regard to the nature of the remedies, the character of the relief sought, and the identity of the parties in the different suits.

Likewise, in Pacific Live Stock Co. v. Lewis, 241 U. S. 440,447, it was said:

The rule that where the same matter is brought before [fol. 73] courts of concurrent jusdiction, the one first obtaining jurisdiction will retain it until the controversy is determined, to the entire exclusion of the other, and will maintain and protect its jurisdiction by an appropriate injunction, is confined in its operation to instances where both suits are substantially the same; that is to say; where there is substantial identity in the interests represented, in the rights asserted, and in the purposes sought. Buck v. Colbath, 3 Wall. 334,345, 18 L. ed. 257,261; Watson v. Jones, 13 Wall. 679,715, 20 L. ed. 666,671; Rickey Land & Cattle Co. v. Miller & Lux, 218 U. S. 258,262, 54 L. ed. 1032, 1038.

Also, in Watson v. Jones, 13 Wall. 679,715, the Court announced:

But when the pendency of such a suit is set up to defeat another, the case must be the same. There must be the same parties or, at least, such as represent the same interest, there must be the same rights asserted, and the same relief prayed for. This relief must be founded on the same facts, and the title or essential basis of the relief sought must be the same. The identity in these particulars should be such

that if the pending case had already been disposed of, it could be pleaded in bar as a former adjudication of the same matter between the same parties.

In view of the importance of the question to the public generally, the fact that although four justices sat throughout the hearing and only three participated in the consideration and decision of the case, one of whom dissented, it is respectfully submitted that a re-hearing should be granted, to the end that the question may be considered by the full Court, and determined in harmony with the previous decisions of this Court and those of the Supreme Court.

Joseph T. Sherier, Attorney for Appellant.

Service of a copy of the foregoing motion acknowledged this — day of August, 1937.

Crandall Mackey, Attorney for Appellee.

[fol. 74] [Endorsed:] In the United States Court of Appeals for the District of Columbia. Mark O. Davis, Appellant, vs. Maude E. Davis, Appellee. No. 6745. Motion for Rehearing. United States Court of Appeals for the District of Columbia. Filed Aug. 16, 1937. Moncure Burke, Clerk. Law offices of Leckie and Sherier, 1001 15th Street, N. W., Washington, D. C.

[fol. 75] Monday, August 23rd, A. D. 1937.

No. 6745.

Mark O. Davis, Appellant,

vs.

Maude E. Davis

On consideration of the motion for a rehearing in the above entitled cause, It is ordered by the Court that said motion be and the same hereby is granted, and it is further ordered that this cause be and the same hereby is restored to the calendar for rehearing in due course. (The Chief Justice dissenting.)

[fol. 76] Friday, November 12th, A. D. 1937.

No. 6745

MARK O. DAVIS, Appellant,

vs.

MAUDE E. DAVIS

The re-argument in the above entitled cause was commenced by Mr. Joseph T. Sherier, attorney for appellant, and was continued by Mr. Crandal Mackey, attorney for appellee, and was concluded by Mr. Joseph T. Sherier, attorney for appellant. (Mr. Justice Robb not sitting.)

[fol. 77] UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 6745

MARK O. DAVIS, Appellant,

v.

MAUDE E. DAVIS

Appeal from the Supreme Court of the District of Columbia [1]

Decided March 7, 1938

Joseph T. Sherier, of Washington, D. C., for appellant.
Crandal Mackey, of Washington, D. C., for appellee.

Before Groner, Stephens and Miller, JJ.

MILLER, J.:

On October 29, 1925, appellant was granted a divorce a mensa et thoro from his wife, appellee herein, by the Supreme Court of the District of Columbia (now the District Court of the United States). The wife was awarded

[1] Now the District Court of the United States for the District of Columbia. Act of June 25, 1936, 49 Stat. 1921.

custody of the minor daughter and alimony in the sum of $300 per month.

Under Section 73, Title 14, D. C. Code, 1929, the lower court retained jurisdiction of the cause for future modification of its decree in respect to alimony and custody.[2]

In 1929 appellant filed a petition in the same case praying that the decree of October 29, 1925 be set aside or modified on the ground that subsequent to the granting of that decree, he had obtained a divorce a vinculo matrimonii in the Circuit Court of Arlington County, Virginia. (His wife appeared specially in the Virginia suit.) From an order denying the relief prayed, an appeal was taken to this court and we affirmed that order. Davis v. Davis, 57 F. (2d) 414, 61 App. D. C. 48 (1932).

On April 16, 1935, more than three years after our decision in that appeal, appellant filed a new petition in the court below—still in the same case—again seeking to set aside or modify the decree of October 29, 1925, and alleging three ground for relief, namely, the marriage of the minor daughter subsequent to the 1929 order, the Virginia decree, which was set out in the previous petition, and a reduction in the income of appellant. The last ground was abandoned at the hearing below.

[fol. 78] The lower court again denied the petition, stating:

"Well, of course, there is a conflict between this Bloedorn case[3] and this Davis case.[4] There is no doubt about that. In the Bloedorn case they concede the Virginia decree did operate to do away with the provisions of the District decree. In this Davis case they hold that it did not."

"And if this case came before me without this decision, that is one thing, but it has been before the Court of Appeals and that is what the Court of Appeals held—*the plaintiff's prayer is rested solely on the decree entered in Virginia.*

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[2] This section provides: "After a decree of divorce in any case granting alimony and providing for the care and custody of children, the case shall still be considered open for any future odrers in those respects."

[3] Bloedorn v. Bloedorn, 76 F. (2d) 812, 64 App. D. C. 199, cert. denied 295 U. S. 746.

[4] Davis v. Davis, 57 F. (2d) 414, 61 App. D. C. 48.

"So I am going to deny this [petition]." [Italics supplied].

It is apparent from the language quoted that the lower court, in disposing of the case—apparently through inadvertence—confined its consideration to the second ground urged, and failed to consider appellant's prayer for relief based upon his daughter's marriage. This is assigned as error. A petition for the reduction of alimony is addressed to the sound discretion of the lower court, and the ruling thereon will not be disturbed on appeal unless there has been an abuse thereof.[5] Was there an abuse of discretion here?

The ruling of the lower court was founded upon our opinion in the first appeal. Davis v. Davis, supra. Certainly, it cannot seriously be said that we there passed upon the question raised by the daughter's marriage. We pointed out instead that the appellant's prayer for relief was rested solely upon the Virginia divorce decree, and that there was no allegation of any other change in the circumstances of the parties. As a matter of fact the marriage of the daughter had not at that time taken place. Moreover, our opinion on the former appeal is devoid of any statement limiting, directly or by implication, the power of the lower court to consider subsequent thereto such a change in circumstances. See Chase v. United States, 8 Cir., 261 F. 833. On the contrary, we based the decision explicitly on the ground that the lower court, having first taken jurisdiction of the case, retained jurisdiction under the statutes of the District of Columbia "to enter further and additional orders therein respecting the alimony of the wife and the care and custody of the minor daughter." Davis v. Davis, supra.

Under such circumstances the applicable rule is set forth in Seibert v. Minneapolis & St. L. Ry., 58 Minn. 58, 64, 57 N. W. 1068, 1070, as follows: "It is elementary that if

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[5] Jackson v. Jackson, 68 F. (2d) 393, 62 App. D. C. 346; Cook v. Cook, 168 Wash. 649, 13 P. (2d) 38; Willen v. Willen, 119 Cal. App. 483, 6 P. (2d) 554. See also Garrett v. Garrett, 62 F. (2d) 471, 61 App. D. C. 309, and cases there cited; Lovegrove v. Lovegrove, 128 Va. 449, 104 S. E. 804; Steinert v. Steinert, 215 Mo. App. 337, 250 S. W. 924.

relief lying within the sound discretion of the trial court is refused on the ground of want of power to grant it, or upon any other ground that proves the nonexercise of that discretion, such decision will be reversed, and the case remanded, with a direction to exercise the discretion." See, also, Palliser v. Home Telephone Co., 170 Ala. 341, 54 So. 499; Martin v. Bank of Fayetteville, 131 N. C. 121, 42 S. E. 558.

[fol. 79] That the marriage of a daughter may constitute a good and sufficient reason for modification of a previous order for support and maintenance is well settled. It has been held that the marriage of a minor daughter, creating relationships inconsistent with parental control, emancipates her from the custody, care and control of her parents;[6] that an emancipation works as complete a severance of the legal filial relationship as if the child had reached majority,[7] thus relieving the parent of all legal obligation for support (Perkins v. Westcoat, 3 Colo. App. 338, 33 P. 139), even though in a particular case it may not affect the power of a court to control the custody of the child. Richardson v. Browning, 18 F. (2d) 1008, 1012, 57 App. D. C. 186, 190. It is not necessary for us to consider these questions on their merits, but it is obvious that such a change in circumstances, with the possibility of such far-reaching effects, is one eminently proper for consideration in disposing of appellant's petition.

Consequently, the omission of the court to consider the matter presented by appellant in support of his petition constituted failure to exercise its discretion (Mattox v. United States, 146 U. S. 140, 147, 151), thus unfairly depriving him of his rights under the circumstances (Pettegrew v.

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[6]Delaware, L. & W. R. R. v. Petrowsky, 2 Cir., 250 F. 554, cert. denied 247 U. S. 508; State v. Lowell, 78 Minn. 166, 80 N. W. 877; Bucksport v. Rockland, 56 Me. 22; Bonnette v. Flournoy, 9 La. App. 467, 119 So. 736; People v. Ham, 206 Ill. App. 543; Rinaldi v. Rinaldi, 94 N. J. Eq. 14, 118 A. 685; Bishop, Marriage, Divorce and Separation (1891) § 557.

[7]Memphis Steel Const. Co. v. Lister, 138 Tenn. 307, 197 S. W. 902; Iroquois Iron Co. v. Industrial Commission, 294 Ill. 106, 128 N. E. 289; Wabash R. R. v. McDoniels, 183 Ind. 104, 107 N. E. 291; Brosius v. Barker, 154 Mo. App. 657, 136 S. W. 18.

Pettegrew, 128 Neb. 783, 788, 260 N. W. 287, 289; Langnes v. Green, 282 U. S. 531, 541); and requires that the cause be remanded "for further proceedings from the point where the error was committed." Taft, J., in Felton v. Spiro, 78 F. 576, 581, 583.

Appellant also urges that the lower court should recognize the Virginia decree and, upon the basis thereof, revoke or modify its previous order for alimony. The appellee contends, and the lower court held, that it was foreclosed from so doing by our decision in Davis v. Davis, supra. There can be no doubt that on the first appeal precisely the same issue was presented. We there held that the lower court properly denied appellant's prayer for relief based upon the Virginia decree. Unless that decision can, and should, be disregarded, it constitutes the law of the case, and the decision of the lower court, based thereon, must govern henceforth, in so far as it is founded upon our disposition of that particular issue.

This court has adopted and applied "the law of the case" rule. District of Columbia v. Brewer, 32 App. D. C. 388; Warner v. Grayson, 24 App. D. C. 55. The Supreme Court had said, however, that the rule does not constitute an absolute limit upon the power of the court, but, rather, expresses the practice of courts generally to refuse to reopen what has been decided. Messenger v. Anderson, 225 U. S. 436, 444, and cases there cited; King v. West Virginia, 216 U. S. 92, 100-101. The court has power, under some circumstances, to disregard a prior decision, although it should not be exercised except in a clear case (Williams v. Order of Commercial Travelers, 6 Cir., 41 F. (2d) 745), [fol. 80] where the earlier adjudication was plainly wrong (Seagraves v. Wallace, 5 Cir., 69 F. (2d) 163, 165; Rogers v. Chicago, R. I. & P. Ry., 8 Cir., 39 F. (2d) 601, 604), and where the application of the "law of the case" rule would work manifest injustice. Zurich General Accident and Liability Ins. Co. v. O'Keefe, 8 Cir., 64 F. (2d) 768, 770; Johnson v. Cadillac Motor Car Co., 2 Cir., 261 F. 878, 886. Cf. United States v. Moser, 266 U. S. 236, 242.

It is difficult to see in what respect our earlier adjudication was so clearly wrong, or the application of the "law of the case" rule so certain to work manifest injustice upon the parties as to require its repudiation in this case. It is only with respect to the Virginia decree of divorce that the

lower court is foreclosed from acting upon appellant's petition. As already indicated, it is at liberty to give full consideration to all other changes of circumstances, including those occasioned by the marriage and consequent emancipation of the daughter. It is true that since our decision in Davis v. Davis, supra, we have held in Bloedorn v. Bloedorn, 76 F. (2d) 812, 64 App. D. C. 199, cert. denied 295 U. S. 746, and Atkinson v. Atkinson, 82 F. (2d) 847, 65 App. D. C. 241, that decrees of divorce entered by courts of Virginia and Maryland, respectively, were valid in the District of Columbia. However, each of those cases is distinguishable from the present appeal, and the mere fact that a different result was reached is of no significance.

In the Bloedorn case the wife, appearing as plaintiff in a suit in the District of Columbia, obtained a consent decree for separate maintenance, together with an award of alimony. The husband later sued in Virginia for an absolute divorce and the wife appeared generally to defend therein. This court held that the Virginia decree, in his favor, must be given full faith and credit in the District of Columbia, pursuant to Article IV, Section 1 of the Constitution, because it was undisputed that the Virginia court had full jurisdiction of the parties and the subject matter. Haddock v. Haddock, 201 U. S. 562.

In the Davis case, on the other hand, the Virginia court did not have full jurisdiction of the parties and the subject matter, and, hence, the decree was not entitled to full faith and credit in the District of Columbia. In order that the Virginia decree should be entitled to full faith and credit elsewhere, it was necessary, in addition, under the law as stated in Haddock v. Haddock, supra, that Virginia be the last matrimonial domicil of the parties, or, if not, that the wife be subjected to the jurisdiction of the court either by personal service within the state or by voluntary appearance and participation in the suit, as in the Bloedorn case. It can hardly be contended seriously in the present case that Virginia was the last matrimonial domicil. The wife and child never lived there. The only basis for such a contention is that the domicil of the husband was the domicil of the wife (Atherton v. Atherton, 181 U. S. 155; Restatement, Conflict of Laws (1934) §§ 27, 28), on the theory that he was the innocent party and that she was guilty of desertion. On the other hand, the rule governing the present situation is set

out in Section 29 of the Restatement, Conflict of Laws, as follows:

Upon the termination of the marriage in any way, or upon judicial separation, the wife can acquire a new domicil; until [fol. 81] she does so, she retains the domicil which she had at the time of the termination of the marriage relation.

Since the District of Columbia court, at the instance of the husband, separated the parties by a divorce a mensa et thoro and provided for separate maintenance of the wife, there can be no presumption that the matrimonial domicil shifted to Virginia following the acquisition of a new domicil by the husband. See Rinaldi v. Rinaldi, 94 N. J. Eq. 14, 18, 118 A. 685, 686-687. Moreover, the special appearance of the wife in the Virginia suit was not sufficient to give full jurisdiction. It did not constitute a waiver of objection to jurisdiction. Andrews v. Andrews, 188 U. S. 14, 39-41. See Baldwin v. Iowa State Traveling Men's Assn., 283 U. S. 522; Morris & Co. v. Skandinavia Ins. Co., 279 U. S. 405, 409; Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 234; Toledo Railways & Light Co. v. Hill, 244 U. S. 49; Davis v. O'Hara, 266 U. S. 314, 319.*

In the Atkinson case, as in the present appeal, the full faith and credit clause was not controlling because the Maryland court did not have personal jurisdiction of the wife, nor was the matrimonial domicil there. The question involved was whether the District of Columbia court would, under the comity rule, and with due regard for considerations of public policy, recognize the Maryland decree. We held that it should be recognized to the extent of destroying the marriage status. In the present case the appellant seeks to assert the effect of the Virginia decree for the purpose of reducing alimony and support money. The rule

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*There is state authority to the effect that a special appearance to test a court's jurisdiction over the subject matter constitutes a general appearance. Isham v. People, 82 Colo. 550, 262 P. 89; State v. Industrial Commission of Ohio, 50 Ohio App. 269, 198 N. E. 56. Virginia, however, appears to follow a contra rule. Abel v. Smith, 151 Va. 568, 144 S. E. 616. See, also, Mann v. Mann, 170 La. 958, 129 So. 543, and Robinson v. Glover, 60 S. D. 270, 244 N. W. 322.

as applied in the Atkinson case is equally applicable here but produces the opposite result. The following considerations set out in our opinion in that case, and bearing upon the question of public policy, are significant in distinguishing it from the present case: (1) Neither party to the Maryland decree was attacking it; (2) it was apparent that each of the parties thereto desired a severance of the marriage tie, as the husband was the plaintiff in the Maryland suit and the wife had remarried; (3) the purpose of the suit was to annul the remarriage of the divorced wife because of the claimed invalidity of the Maryland divorce decree and we held, under the circumstances, it was "more in the interest of public policy to validate the remarriage than to set it aside"; and (4) the law of the District had recently been changed to authorize absolute divorce on account of desertion—the ground upon which the Maryland decree had been granted.

As these considerations were and are missing in the present case, the Atkinson case provides little in the way of guidance. The Davis case was decided on its own facts, tested by the rule of public policy. Although the considerations which went into the application of that rule to the facts of the case are not spelled out in the opinion they can be easily ascertained. At the time that decision was rendered desertion was a sufficient ground for absolute divorce in Virginia, but in the District of Columbia was ground for limited divorce only. Moreover, the law of [fol. 82] Virginia and the law of the District were in conflict respecting the payment of alimony to a divorced wife by the husband in whose favor the decree was entered. These two reasons, or either of them, were sufficient to support the decision. In view of the changes which have since occurred in the law of the District there may now be less reason for holding, as a matter of public policy, that a Virginia decree, rendered under the circumstances of the Davis case, should be denied effect in the District. The Atkinson case, perhaps, indicates such a trend. It does not follow, however, that our decision in the Davis case was wrong. It is still the law of the case.

Reversed and remanded for further proceedings in accordance herewith.

[fol. 83] Monday, March 7th, A. D. 1938.

JANUARY TERM, 1938

No. 6745

MARK O. DAVIS, Appellant,

vs.

MAUDE E. DAVIS

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was reargued by counsel.

On consideration whereof, It is now here ordered, adjudged, and decreed by this Court that the decree of the said Supreme Court, now District Court of the United States for the District of Columbia, in this cause be, and the same is hereby, reversed with costs, and that this cause be and the same is hereby remanded to the said District Court for further proceedings in accordance with the opinion of this Court.

Per Mr. Justice Miller.

March 7, 1938.

Mr. Justice Robb did not sit in this case.

[fol. 84] IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, APRIL TERM, 1936

No. 6745

MARK O. DAVIS, Appellant,

vs.

MAUDE E. DAVIS, Appellee

DESIGNATION OF RECORD

The Clerk will please prepare a transcript on application for certiorari to the Supreme Court of the United States in the above entitled cause, including therein the following:

1. The printed record in the Court of Appeals.
2. Minute entry showing argument of cause.
3. Opinion.

4. Petition for rehearing.
5. Minute entry showing granting of rehearing.
6. Minute entry showing argument of cause on rehearing.
7. Opinion on rehearing.
8. Judgment or decree.
9. This designation and Clerk's certificate.

Joseph T. Sherier, Attorney for Appellant.

Service of a copy of the foregoing designation acknowledged this 18th day of March, 1938.

Crandal Mackey (by Dora Willner), Attorney for Appellee.

[fol. 85] [Endorsed:] No. 6745. Mark O. Davis, Appellant, vs. Maude E. Davis, Appellee. Designation of Record. United States Court of Appeals for the District of Columbia. Filed Mar. 18, 1938. Joseph W. Stewart, Clerk. Joseph T. Sherier, Attorney for Appellant.

[fol. 86] United States Court of Appeals for the District of Columbia

I, Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia, hereby certify that the foregoing printed and typewritten pages numbered from 1 to 85, inclusive, constitute a true copy of the transcript of record and proceedings of the said Court of Appeals as designated by counsel for the appellant in the case of Mark O. Davis, Appellant, vs. Maude E. Davis, No. 6745, January Term, 1938, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 18th day of March, A. D. 1938.

Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia. (Seal United States Court of Appeals for the District of Columbia.)

[fol. 87] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 25, 1938

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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CHARLES ELMORE CROPLEY
CLERK.

IN THE

Supreme Court of the United States

January Term, 1938.

No. [redacted] 16

MARK O. DAVIS, *Petitioner*,

v.

MAUDE E. DAVIS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, AND BRIEF IN SUPPORT THEREOF.

JOSEPH T. SHERIER,
Attorney for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

January Term, 1938.

No. ——

MARK O. DAVIS, *Petitioner*,

v.

MAUDE E. DAVIS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, AND BRIEF IN SUPPORT THEREOF.

Mark O. Davis respectfully petitions this Court to grant a writ of certiorari to the United States Court of Appeals for the District of Columbia, to remove therefrom, for review here, the record in the case therein No. 6745, wherein petitioner is appellant and Maude E. Davis is appellee, and in which case that Court announced its opinion under date of March 7, 1938 (R. p. 73), reversing the decision of the District Court of the United States for the District of Columbia.

Reasons Relied Upon for Allowance of the Writ.

1. The decision of the court below, refusing recognition to the decree of the Virginia court, violates Article IV, Section 1 of the Constitution.

2. The holding of the court below, denying full faith and credit to the Virginia decree, is not only in conflict with the decisions of this Court, but also with its own earlier rulings.

3. The ruling of the court below that the appearance and participation of the respondent in the hearing on the question of jurisdiction in the Virginia court did not give that court full jurisdiction, and did not constitute a waiver of objection to jurisdiction, is in direct conflict with the decisions of this Court.

4. The ruling of the court below that the petitioner, subsequent to the judicial separation granted him, could not acquire a new domicile which would support an action for divorce, is in conflict with the decisions of this Court.

5. The ruling of the court below that the petitioner could not acquire a new domicile which would support an action for divorce, is in conflict with its own prior decisions.

6. The holding below that, in the absence of personal service in Virginia or the voluntary appearance of the wife and participation in the hearing on the merits, the Virginia decree was not entitled to full faith and credit, because that state was not the last matrimonial domicile of the parties, conflicts with every decision of this Court and the court below on the subject.

7. The decision of the court below was by three judges only, and not by the full court of five required by statute, although hearing by the full court was requested.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued by this Court, directed to the United States Court of Appeals for the District of Columbia, commanding that court to certify and send to this Court, for its review and determination, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 6745, *Mark O. Davis, Appellant*, v. *Maude E. Davis, Appellee*, and that the judgment of the court below be reversed by this Court, and that your petitioner have such other and further relief in the premises as to this Court may seem just.

JOSEPH T. SHERIER,
Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION.

Opinions of the Courts Below.

The opinion below, announced March 7, 1938, is found on page 73 of the record.

The oral opinion of the District Court of the United States for the District of Columbia will be found at pages 57 and 58 of the record.

Jurisdiction.

The jurisdiction of this Court is invoked under the provisions of Sec. 240 of the Judicial Code as amended by Act of February 13, 1925, Title 28 U. S. C. A., Sec. 347a.

Statement of the Case.

On October 29, 1925, the Supreme Court of the District of Columbia (now District Court of the United States for the District of Columbia), entered its decree, granting the petitioner, hereafter designated as the husband, a divorce *a mensa et thoro* from the respondent, hereafter spoken of as the wife, and awarded the custody of the infant daughter of the parties to the wife. It required the husband to pay monthly the sum of $300.00 for the maintenance of the wife and daughter, and tuition charges for the daughter.

On February 24, 1928, the husband, then a resident of Arlington County, Virginia, filed his bill in the circuit court thereof, praying an absolute divorce from the wife, on the ground of her desertion. She was served in the District of Columbia with process of the Virginia court; appeared specially and, by plea, challenged the jurisdiction of the court on the ground that the husband had not been an actual bona

fide resident of the State for one year next preceding the commencement of his suit, as required by the Virginia statute. R. pp. 26, 27, 32.

In conformity to its practice, the Virginia court referred the issue presented to a commissioner in chancery to take testimony and report. The wife and three witnesses testified in her behalf. The husband offered proof as to the bona fides of his residence. The commissioner found and reported that the husband was an actual bona fide resident of Arlington County, Virginia, for more than one year before the filing of his suit. Exceptions to the report were overruled and the husband adjudged to be an actual bona fide resident of the county and state. No appeal was taken from this order. R. pp. 34, 35, 36, 37.

Thereafter testimony was taken on the merits of the cause, seasonable notice of the time and place of each hearing having been given the wife. R. p. 23. Subsequent to the order confirming the commissioner's report, she did not appear in the cause.

On June 26, 1929, a final decree granted the husband an absolute divorce, without alimony to the wife. R. p. 22.

On December 30, 1929, the husband filed in the Supreme Court of the District of Columbia his petition, setting up the proceedings in the Virginia court and praying that the decree of the District Supreme Court entered October 29, 1925, insofar as it required the payment of alimony to the wife, be vacated. Neither answer nor proof challenged the allegations of the petition. After hearing as on demurrer, an order denied the prayers of the petition.

An appeal to the court below resulted in affirmance of the judgment. 61 App. D. C. 48. The opinion shows it did not then decide the Virginia decree was not entitled to recognition in this District, but, on the contrary, based its judgment on the ground that the local court, having first acquired jurisdiction of the cause, its authority continued and could not be annulled or superseded by the courts of Virginia. R. pp. 61, 75.

On October 27, 1933, the husband remarried in Virginia. R. p. 53.

The petition here involved was filed on April 16, 1935. It averred the entry of the decree of the Supreme Court of the District, granting the limited divorce, and the Virginia proceedings. An answer alleged want of jurisdiction in the Virginia court, because the husband was not a bona fide resident of the state. It did not plead the judgment of the court below on the former appeal as *res judicata* of the questions presented. The husband moved to strike the answer on the ground that the defense relied upon was not available to the wife because of the prior judgment of the Virginia court on the issue of jurisdiction. The motion was denied on the ground that, although the wife had submitted to the Virginia court the question of the domicile of the husband, and was bound by its decision in that respect, she had not submitted to that court the merits of the cause, and its decree was not *res judicata* on the question of the matrimonial domicile, nor upon the merits of the cause. Rehearing of the motion was denied. R. p. 56.

Thereafter the cause came on for hearing in the trial court on petition and answer. Counsel for the wife orally requested the court to continue the hearing, stating that he desired to offer the testimony of the wife and three witnesses (none of whom were in attendance upon the court) to the effect that the husband was not an actual bona fide resident of Virginia at the time of filing his suit there. The husband opposed the application because it was not seasonably made, and on the further ground that he would admit the witnesses, if present, would testify as indicated by the wife's counsel. He claimed, however, such testimony would be inadmissible in view of the prior adjudication of the Virginia court on that issue. The admission was not required by the court. The motion was denied.

The husband thereupon offered in evidence the prior proceedings in the District court, and those in the Virginia court. No testimony supported the answer.

The petition was denied on the ground that the issues presented were controlled by the former decision of the court of appeals.

From this ruling the husband appealed to the court below, which affirmed the judgment. Although stating in its opinion that its former decision established the law of the case, (notwithstanding it had not therein decided the question here presented) the court below considered the question of the effect to be given the Virginia decree, and held that to entitle it to full faith and credit in the courts of the District of Columbia it must appear that Virginia was the last matrimonial domicile of the parties, or, if not, that the wife was subjected to the jurisdiction of the Virginia court either by personal service within the state or by voluntary appearance and participation in the trial on the merits. It accordingly denied effect to the Virginia decree.

The challenged decision was by a court of three judges only, whereas the statute required a full bench of five judges.

Specification of Errors.

1. The court below erred in holding that the Virginia court did not have jurisdiction of the subject matter and the parties, and in denying to its judgment full faith and credit.

2. The court below erred in hearing and determining the cause in the absence of the required full court of five judges.

Questions Presented.

I. Was the judgment of the Virginia court, concededly valid in that state, entitled to full faith and credit in the courts of the District of Columbia?

II. Was the judgment of the court below, by less than the *required full* court of five judges, valid?

ARGUMENT.

1. The decision of the court below, refusing recognition to the decree of the Virginia court violates Article IV, Section 1, of the Constitution.

Section 1, Article IV, of the Constitution requires that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state."

Section 905, Rev. Stats. (U. S. Comp. Stats. 1901, p. 677) provides:

> "that the said records and judicial proceedings so authenticated shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken."

It is not disputed that the Virginia court had jurisdiction over the matter of divorces, and it is not denied that service of process upon the wife was obtained in strict accordance with the provisions of the state statute. The question of the residence of the husband having been unsuccessfully challenged by the wife in the state court, its decision in that respect is final.

Section 5103 of the Code of General Laws of Virginia conferred jurisdiction upon the circuit court of Arlington County to grant divorces where the complaining party had been a resident of the state for one year. The manner of obtaining service upon non-resident defendants is provided by Section 5108. The wife's unsuccessful attack on the court's jurisdiction over the husband on the ground of his non-residence established its complete authority to proceed to a final decree, valid in that state. Being valid there, it is entitled in the courts of the District of Columbia to the same faith and credit accorded it by law or usage in Virginia.

The refusal of the court below to give that decree the full effect required is violative of the Constitution and statutes

of the United States. *Cheeley* v. *Clayton*, 110 U. S. 701, 705; *Atherton* v. *Atherton*, 181 U. S. 155; *Thompson* v. *Thompson*, 226 U. S. 551.

2. The holding of the court below, denying full faith and credit to the Virginia decree, is not only in conflict with the decisions of this Court, but also with its own earlier rulings.

In *Thompson* v. *Thompson*, *supra*, affirming 35 App. D. C. 14, this Court held that a decree of the Virginia court, awarding the husband an absolute divorce, without alimony to the wife, was entitled to recognition in the courts of the District of Columbia and, when presented to the latter, had the effect of annulling a decree for maintenance in favor of the wife. There it was said:

> "This being so, it is clear that the resulting decree is entitled, under the Act of Congress, to the same faith and credit that it would have by law or usage in the courts of Virginia. As the laws of that state provide for a divorce from bed and board for the cause of desertion, and confer jurisdiction of suits for divorce upon the circuit courts; * * * and since the courts of Virginia hold upon general principles that alimony has its origin in the legal obligation of the husband to maintain his wife, and that although this is her right, she may by her conduct forfeit it, and where she is the offender, she cannot have alimony on a divorce decreed in favor of the husband * * * it is plain that such a decree forecloses any right of the wife to have *alimony* or equivalent maintenance from her husband under the law of Virginia.
>
> "From this it results that the Court of Appeals of the District of Columbia correctly held that the Virginia decree barred the wife's action for maintenance in the courts of this District."

This ruling of the Court followed its prior decisions in *Cheeley* v. *Clayton*, and *Atherton* v. *Atherton*, *supra*.

As shown above, the present holding of the court below conflicts with its earlier reasoning and conclusion in *Thomp-*

son v. *Thompson*, *supra*. It is also opposed to *Bloedorn* v. *Bloedorn*, 64 App. D. C. 199, 201, which sustained a Virginia decree of absolute divorce in favor of the husband as a bar to the right of the wife to maintenance under a prior decree of the District court. The court below there stated:

> "While the decree appealed from in form merely dismisses a motion and discharges a rule in respect of a small amount of alimony then accrued, in legal effect it operates to va ate the provision made for the wife by recognizing that she is no longer wife, because of the Virginia decree, and the Virginia law makes no provision for *alimony* to a wife against whom a divorce has been granted. *Thompson* v. *Thompson*, 226 U. S. 551."

3. The ruling of the court below that the appearance and participation of the wife in the hearing in the Virginia court on the question of jurisdiction did not give that court full jurisdiction, and did not constitute a waiver of objection to jurisdiction, is in direct conflict with the decisions of this Court.

The court below apparently thought that the special appearance and unsuccessful contest of the wife of the jurisdiction of the Virginia court over the husband did not confer upon that court authority to proceed to a valid, final judgment, and did not constitute a waiver of objection to jurisdiction or estop her to again litigate that question in another forum.

This ruling, it is believed, is in direct conflict with the holding of this Court in *Baldwin* v. *Iowa State Traveling Men's Association*, 283 U. S. 522, 525, where it was decided that a defendant, appearing specially to contest the jurisdiction of the court, and having had his day in court on that issue, could not again litigate the question in a suit brought to enforce the judgment in a nother court. This Court there said:

> "The special appearance gives point to the fact that the respondent entered the Missouri court for the very

purpose of litigating the question of jurisdiction over its person. It had the election not to appear at all. If, in the absence of appearance, the court had proceeded to judgment and the present suit had been brought thereon, respondent could have raised and tried out the issue in the present action, because it would never have had its day in court with respect to jurisdiction. * * * It had also the right to appeal from the decision of the Missouri district court, as is shown by *Harkness* v. *Hyde*, 98 U. S. 476, 25 L. ed. 237, supra, and the other authorities cited. It elected to follow neither of those courses, but after having been defeated upon full hearing in its contention as to jurisdiction, it took no further steps, and the judgment in question resulted.

"Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause."

See also *American Surety Co.* v. *Baldwin*, 287 U. S. 166.

4. The ruling of the court below that the petitioner, subsequent to the judicial separation granted him, could not acquire a new domicile which would support an action for divorce, is in conflict with the decisions of this Court.

In *Barber* v. *Barber*, 21 How. 582, 594, this Court quotes with approval the statement from Bishop on Marriage & Divorce, as follows:

> "If he commits an offense which entitles her to have the marriage dissolved, she is not only discharged thereby immediately, and without a judicial determination of the question, from her duty to follow and dwell with him, but she must abandon him, or the cohabitation will amount to a condonation, and bar her claim to the remedy. In other words, *she must establish a domicile*

*of her own, separate from her husband. * * * So when parties are already living under a judicial separation, the domicile of the wife does not follow that of the husband."*

Likewise, in *Cheever* v. *Wilson*, 9 Wall. 108, 124, this Court stated:

> "The rule is that she may acquire a separate domicile whenever it is necessary or proper that she should do so. * * * The proceeding for a divorce may be instituted where the wife has her domicile, *the place of the marriage*, of the offense, and *the domicile of the husband are of no consequence.*"

The same conclusion is reached in *Haddock* v. *Haddock*, 201 U. S. 562, 583, where this Court, in discussing the right of an innocent spouse to establish a separate domicile, said:

> "Of course, the rigor of the English rule as to the domicile of the husband being the domicile of the wife is not controlling in this court, in view of the decisions to which we have previously referred, recognizing the right of the wife, for the fault of the husband, to acquire a separate domicile."

And, finally, in *Williamson* v. *Osenton*, 232 U. S. 619, 625, 626, this Court again upheld the right of the innocent spouse to acquire a new domicile, saying:

> "However it may be in England, that in this country a wife in the plaintiff's circumstances *may get a different domicile from that of her husband for purposes of divorce is not disputed and is not open to dispute. * * * This she may do without necessity and simply from choice,* as the cases show, *and the change that is good as against her husband ought to be good as against all. In the later decisions the right to change and the effect of the change are laid down in absolute terms.*"

This rule, of course, operates in favor of a husband in like circumstances. *Hunt* v. *Hunt*, 72 N. Y. 217, 242.

5. The ruling of the court below that the petitioner could not acquire a new domicile which would support an action for divorce, is in conflict with its own prior decisions.

In *Rollins* v. *Rollins*, 60 App. D. C. 305, 307, and in *Marcum* v. *Marcum*, 61 App. D. C. 332, 334, the court below, following the decision of this Court in *Williamson* v. *Osenton*, *supra*, said:

> "Undoubtedly the wife may establish a different domicile from that of her husband for purposes of divorce. *Williamson* v. *Osenton*, 232 U. S. 619, 625, 34 S. Ct. 442, 58 L. Ed. 758. And this right is absolute whenever it is necessary or proper that she should do so. It springs from necessity, and endures as long as the necessity. In such cases, the legal fiction that the domicile of the husband is the domicile of the wife does not apply, and, when conditions require her to leave the home, or when she is driven from it and goes into another state for the purpose of there permanently residing, *she acquires a domicile in the latter which may entitle her to sue for divorce.*"

6. The holding below that, in the absence of personal service in Virginia or the voluntary appearance of the wife and participation in the hearing on the merits, the Virginia decree was not entitled to full faith and credit, because that state was not the last matrimonial domicile of the parties, conflicts with every decision of this Court and the court below on the subject.

Where one spouse has justifiably left the other, or the parties are living apart by virtue of a judicial separation, *there is no matrimonial domicile*, and the innocent party may acquire another, with jurisdiction in the courts of the latter to decree a divorce of binding validity everywhere.

Barber v. *Barber*, *Cheever* v. *Wilson*, *Cheeley* v. *Clayton*, *Haddock* v. *Haddock*, *Williamson* v. *Osenton*, *Rollins* v. *Rollins*, *Marcum* v. *Marcum*, *supra*.

7. The decision of the court below was by three judges only, and not by the full court of five required by the statute, although hearing by the full court was requested.

The Act of February 9, 1893 (27 Stats. 434), establishing the court of appeals of the District of Columbia, provided it should consist of one chief justice and two associate justices. The second paragraph of Section 6 of this Act reads:

> "If any member of the court shall be absent on account of illness or other cause during the session thereof, or shall be disqualified from hearing and determining any particular cause by having been of counsel therein, or by having as a justice of the Supreme Court of the District of Columbia previously passed upon the merits thereof, or if for any reason whatever it shall be impracticable to obtain *a full court of three justices*, the member or members of the court who shall be present shall designate the justice or justices of the Supreme Court of the District of Columbia to temporarily fill the vacancy or vacancies so created, and the justice or justices so designated shall sit in said Court of Appeals and perform the duties of a member thereof while such vacancy or vacancies shall exist, etc. • • •
>
> That if the parties to any cause shall so stipulate in writing, by their attorneys and solicitors, such cause may be heard and determined by two justices of the court without calling in any of the justices of the supreme court of the District of Columbia."

The District of Columbia Code, Section 221, adopted in 1901, recites:

> "The Court of Appeals of said District shall continue as at present organized and shall consist of one chief justice and two associate justices.

By Act of June 19, 1930, (46 Stats. 785) the number of justices was increased to five, but no other change was made in the organic statute.

Until this amendatory statute adding the two additional justices was passed, the court of appeals comprised "a full

court of three justices," and there was *no provision for a quorum*. By the Act of June 19th, *no provision was made for a quorum* and this Act may be construed as simply increasing the number of justices to five and of requiring, by implication, *a full court of five justices*.

It is significant that Congress in statutes relating to the Supreme Court of the United States, the Court of Claims, the Court of Customs Appeals and the old Commerce Court has been careful to specify the number of justices to constitute a quorum for the transaction of business.

In the case of the Supreme Court of the United States, the Act of April 10, 1869, (R. S. U. S., Section 673) provides:

> "The Supreme Court of the United States shall consist of a Chief Justice of the United States and eight associate justices, any six of whom shall constitute a quorum."

Section 685 (Act of April 29, 1802) describes what may be done when a quorum does not attend and Section 686 authorizes the Justices attending at any term when less than a quorum is present to make all necessary orders of a procedural nature.

Section 138, Ann. Fed. Code (U. S. C., Section 243) relating to the Court of Claims (consisting of a chief Justice and four judges) reads:

> "The Court of Claims shall hold one annual session at the City of Washington beginning on the first Monday in December and continuing as long as may be necessary for the prompt disposition of the business of the Court. Any three of the judges of said court shall constitute a quorum and may hold a court for the transaction of business. *The concurrence of three judges shall be necessary to the decision of any case.*"

Section 188, Ann. Fed. Code (U. S. C. 301) establishing the Court of Customs Appeals (consisting of a presiding judge and four associate judges), provides:

"Any three members of said court shall constitute a quorum, and *the concurrence of three members shall be necessary to any decision thereof, etc.*"

Section 200, Ann. Fed. Code, relating to the Commerce Court created by the Act of June 18, 1910, and abolished by the Act of October 22, 1913, created a Court of five judges and provided:

"Four of such judges shall constitute a quorum, and at least a majority of the court shall concur in all decisions, etc."

The Act of February 13, 1925, (43 Stats. 938); Section 266, Ann. Fed. Code (U. S. C., Section 380) authorizing certain of the circuit and district judges to constitute a three judge court for the determination of and the issuance of injunctions in certain specific controversies requires:

"A majority of said three judges shall concur in granting such application."

No stipulation in writing was filed by the parties agreeing that the cause might be heard by less than a full court. In the motion for rehearing which was granted (R. p. 72) request was made for a rehearing *by the full court.* (R. p. 72.) In the light of these statutory precedents, it is submitted that the United States Court of Appeals, as now constituted, is without authority to hear and determine appeals by a court of three justices only.

In *Stratton* v. *St. Louis, Southwestern R. Co.*, 282 U. S. 10, 18, a single district judge, *without objection of the parties,* dismissed a bill in a case within the provision of the Act of Feb. 13, 1925, requiring a hearing by a three judge court.

The circuit court of appeals reversed the district court, and this Court, reversing the court of appeals, said:

"As the proceeding in this suit fell within the provision of the statute and the District Judge had no

jurisdiction to hear the motion to dismiss the bill on the merits, the consent of the parties could not give validity to the decree or confer jurisdiction upon the Circuit Court of Appeals to entertain an appeal therefrom."

The statute here, as there, required a full court and provided the means for obtaining the same.

Notwithstanding the holding of the court below that its earlier decision constitutes the law of the case, such ruling does not preclude this Court from re-examining the question involved. This is particularly true where the opinion under review shows definitely the court considered and determined the point. *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, 419; *Washington Ex Rel. Grays Co.* v. *Superior Court*, 243 U. S. 251, 257; *Davis* v. *O'Hara*, 266 U. S. 314, 321.

The judgment of the court below may be reviewed on certiorari, because, when entered, it will be final as to the question here presented. *George A. Fuller Co.* v. *Otis Elevator Co.*, 245 U. S. 489, 492. See also Title 28, Sec. 347a U. S. C. A.

It is of great public importance, in view of the confusion which exists as the result of the decision below, and the possibility of its disastrous effects upon innocent persons, that this Court should review and reverse the judgment.

Respectfully submitted,

JOSEPH T. SHERIER,
Attorney for Petitioner.

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IN THE

Supreme Court of the United States

January Term, 1938.

No. [redacted] 16.

MARK O. DAVIS, *Petitioner*,

v.

MAUDE E. DAVIS.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

January Term, 1938.

No. ——

MARK O. DAVIS, *Petitioner*,

v.

MAUDE E. DAVIS.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

STATEMENT OF THE CASE AND ARGUMENT.

This is the identical case that was decided by the Court of Appeals of the District of Columbia, on February 23, 1932, and reported in 61 Appeals D. C., at page 48. A reference to the printed record now filed in this court, in connection with the petition for certiorari will show that the authenticated copy of the Virginia proceedings in the present record, was certified in 1929, and is the same record that the Court of Appeals of the District of Columbia had before it in 1932 and in 1937 and in 1938 (Rec. 39.) It is also the same authenticated copy of the Virginia proceed-

ings mentioned at page 49, in 61 Appeals, D. C., and at that time, February 23, 1932, the unanimous opinion of the five justices of the said Court of Appeals states:

> "After the lapse of about four years, to wit: on December 30, 1929, appellant filed a petition in the same case alleging that subsequent to the entry of the decree therein, he had become an actual *bona fide* resident of the State of Virginia, and that in a suit filed by him against his wife in the Circuit Court of Arlington County in that state, he had by lawful proceedings, been awarded a decree granting him a divorce a vinculo matrimonii from her. . . . . , appellant prayed the lower court (December 30, 1929) to set aside its order of October 29, 1925, or so modify the same as not to require appellant to pay any sum whatsoever to the appellee for her maintenance."

In this case decided in February, 1932, from which decision, in favor of the wife, the above is quoted, the D. C. Court of Appeals also said:

> "It may be noted that after the entry of the decree in the lower court, the appellee with her infant daughter, Susanne, has continued to reside in the District of Columbia, and that in the Virginia case, she appeared specially for the sole purpose of denying the jurisdiction of the court upon the ground that the plaintiff was not a *bona fide* resident of the state of Virginia, but was still a resident of the District of Columbia, and had fraudulently simulated a residence in Virginia, for the sole purpose of bringing the divorce case in the courts of that state." (See plea to Jurisdiction in Virginia, Rec. 32.)

And then in 1932, the D. C. Court of Appeals said, on page 49 of 61 Appeals, D. C.:

> "The appellants prayer is rested solely upon the decree entered by the Virginia court."

The case decided by the United States Court of Appeals for the District of Columbia, per decree of January 8, 1937,

Record 59, and again upon re-hearing March 7, 1938, Record 73, was decided upon the same Virginia decree that was before the lower court in 1929, and before the D. C. Court of Appeals and decided in 1932, and again in 1937 and again in 1938, as is above shown, and the rule of *stare decisis* applies for those decisions which nowhere contradict each other, and are the law of this case.

> "The rule of *stare decisis* is founded largely upon the consideration of expediency and sound principles of public policy, it being indispensible to the administration of public justice, especially by a court of last resort, that a question once deliberately examined and decided should be considered as settled and closed to further argument." 15 Corpus Juris p. 304 and cases cited.

The petitioner for the writ of certiorari cites the case of *Cheeley* v. *Clayton*, 110 U. S. 701; and *Atherton* v. *Atherton*, 181 U. S. 155; and *Thompson* v. *Thompson*, 226 U. S. 551, and says that the decision of the D. C. Court of Appeals violates the principles decided in those three cases. *Cheeley* v. *Clayton, supra*, decides that the wife was entitled to share in the estate of her deceased husband, who had divorced her in the courts of Colorado, while she was living in Illinois, and this court refused to recognize the Colorado decree, based upon an order of publication held valid by the court of Colorado, but which this court held to be invalid. The decision is against the petitioner. *Atherton* v. *Atherton, supra*, decides that where the husband had always lived in Kentucky, and Kentucky was the only matrimonial domicile, that notice served upon the wife in another state, in accordance with the laws of Kentucky, entitled the husband to a decree upon proof that his wife had deserted him in Kentucky, without just cause. This decision is also against the petitioner. *Thompson* v. *Thompson, supra*, decides that Virginia having been the domicile of the husband, the only matrimonial domicile, the courts of Virginia had jurisdiction of the case. It was not dis-

puted that Thompson had always been a *bona fide* resident of Virginia. The matter went to the Supreme Court on the question of the sufficiency of the order of publication against the wife, who was then in the District of Columbia. The Supreme Court held it sufficient and said:

> "The parties were married in the state of Virginia, and had a matrimonial domicile there, and not in the District of Columbia or elsewhere. . . . The husband had his actual domicile in that state (Virginia) at all times, until and after the conclusion of the litigations."

This decision is also against the petitioner.

Petitioner says that the court below violated Sec. 1, Article *IV* of the Constitution, which requires that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state." Answer to that statement is found in the following decisions in divorce cases that went to the Supreme Court upon the very question raised by the petitioner here. All of these cases cited below, all cases of divorce in which the state, as well as the husband and wife, if concerned, and is a silent party, hold as follows:

1. That when a husband goes to a state solely for divorce purposes, he does not carry the marital *res* with him, and that the courts of the state to which he has gone, have no jurisdiction to entertain his suit for divorce.

2. That the recitals of the decrees entered in divorce cases in one state are not binding on the court of another state.

3. That the recitals of the decrees entered in one state in divorce cases may be contradicted in another jurisdiction.

4. That the *bona fides* of the residence of a party who obtains a divorce in one state may be inquired into by the courts of another state, and that the motives prompting the

party in making a change of residence may be inquired into by the courts of another state.

Bell v. *Bell*, 181 U. S. 175;
Streitwolf v. *Streitwolf*, 181 U. S. 179;
Andrews v. *Andrews*, 188 U. S. 14;
Haddock v. *Haddock*, 201 U. S. 502;
Simmons v. *Simmons*, 57 D. C. Appeals 216;
Frey v. *Frey*, 61 D. C. Appeals 232;
Cheeley v. *Clayton*, 110 U. S. 701.

Having in mind the foregoing decisions, the respondent by counsel, at the conclusion of the petitioner's case, offered the defendant and three witnesses, who would testify (1) that the plaintiff went to Virginia for the sole purpose of getting a divorce from the defendant, (2) that he never became an actual *bona fide* resident of that state, (3) that the examiner who took the testimony on the issue, presented by the defendant's plea to the jurisdiction of the Virginia court, acted as judge and jury on the admissibility and inadmissibility of evidence. Counsel for the plaintiff advised the court that he would admit that the defendant's witnesses, if present, would so testify, but that he would contend that such testimony was incompetent (Rec. p. 57). The admission was tantamount to saying that the Virginia decree was conclusive of the question of jurisdiction because on the plea to the jurisdiction, testimony was taken on that point and on that testimony, the court assumed jurisdiction, and that made the testimony incompetent in the District of Columbia court. The contrary has been decided by the Supreme Court and D. C. Court of Appeals in all the above cited cases. The court below held in 1929, that the wife did not submit the merits of the case to the Virginia Court. This opinion by Justice Bailey said in part: *"She did not submit the merits of the case to that court. Now the question is whether the matrimonial domicile of the parties was in that state. The decree of that court therefore, is not res adjudicata upon the latter question nor*

upon the merits of the case." (Rec. p. 56). Three times, as heretofore, pointed out, in 1932, and in 1937 and in 1938, the D. C. Court of Appeals has refused to consider the Virginia decree as *res adjudicata*, or as binding on the defendant upon the merits of the cause, which were never submitted to that court by the defendant. The case decided in 1929 in the court below by Justice Bailey was the case that was decided in the D. C. Court of Appeals in February 1932, and it was from that decision of Justice Bailey that the case was taken up. So the matter of the recognition of the Virginia decree was before the court below and the appellate court. Against the statement of counsel for the petitioner here that the question of the validity of the Virginia decree was not before the court at that time we quote from the decision of the D. C. Court of Appeals in February 1932, in this case following: "*The appellant's prayer is rested solely upon the decree entered by the Virginia court.*" (61 D. C. Appeals 49). The present counsel for the petitioner was not counsel in the case at that time and he has evidently not read that decision. That is a charitable view of his misleading statement.

Notwithstanding that decision of the D. C. Court of Appeals in 1932, we find this case again in the said court of appeals upon the same identical question of the recognition of the Virginia decree, which said decree the appellate court disregarded unanimously in 1932. And then on August 9, 1937, that court again held that the Virginia decree was of no avail in this case. Four judges sat in the case and one dissented and on petition, the dissenting justice granted a motion for a rehearing. The case was argued again before the three sitting Justices, Groner, Stephens and Miller, and the court unanimously decided that the Virginia decree was not entitled to full faith and credit in the District of Columbia. Justice Stephens, who had dissented in the previous decision, did not dissent in the decision of March 7, 1938, which was unanimous. There never was a case in which the doctrine of *stare decisis* so aptly applies.

The petitioner having submitted his case to the three sitting judges in the D. C. Court of Appeals, now says that the decision by three judges was not the full court of five required by the statute, although having first mentioned the matter in his petition, which he presented to one of the Justices asking for a rehearing on August 16, 1937. The case had been decided against him August 9, 1937. On March 7, 1938, it was again decided against him. When he asked for a full court, he knew he could not have a full court as Justice Edgerton did not qualify until February 1938, and Congressman Fred M. Vinson has never qualified. The act of February 9, 1893, (27 statutes at large 434) establishing the Court of Appeals for the District of Columbia, did provide that the court should consist of one Chief Justice and two associate Justices, and said that, if, for any reason, it should be impracticable to obtain a full court of three Justices, the member or members of the court present, shall designate a Justice or Justices of the Supreme Court of the District of Columbia, to make up a full court of three, and provided further that if the parties wish to stipulate in writing by their attorneys, a cause might be heard and determined by two Justices without calling on the Supreme Court. There was nothing in the act which required a full court to constitute a quorum. The act of June 19, 1930, (46 statutes at large 785), increased the number of Justices to five, and provided that they "shall have the same tenure of office, pay and emoluments, powers and duties, as provided by law, for the Justices of said court." There was nothing in the act requiring more than three judges to decide a case, just as there was nothing in the act of 1893 requiring more than two judges to decide a case. The court has been in existence forty-five years, and has decided thousands of reported cases, and often every year, by majority decisions, namely, two to one, from 1893 to 1930, a period of thirty-seven years, and since 1930, by majority decisions, both in civil and criminal

cases, regardless of a full court since 1930, and by two to one, when a full court was present from 1893 to 1930.

Not a single case is cited by petitioner to support the contention that in the absence of a statute a majority of a court could not decide a case. He cites a single case and that was where one judge disobeyed a statute requiring three in the court, and dismissed a bill. When three of the five judges decide a case the result would not be affected if the other two judges were there. If the objection made by the petitioner was sustained, as said by the Supreme Court in *Phillips* v. *Payne*, 92 U. S. p. 130, all its sentences, judgments and decrees, where the majority of the court decided cases in the absence of any of its members, would be a nullity, and in this case the serious consequences would run back 45 years in some cases and in others 8 years.

It is respectfully submitted that the petition for the writ be denied.

Respectfully submitted,

CRANDAL MACKEY,
Attorney for Respondent,
719 15 St., N. W.,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 16.

MARK O. DAVIS, *Petitioner*,

v.

MAUDE F. DAVIS.

PETITION FOR RECALL AND CLARIFICATION OF MANDATE.

JOSEPH T. SHEARER,
Attorney for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 16.

MARK O. DAVIS, *Petitioner*,

v.

MAUDE E. DAVIS.

PETITION FOR RECALL AND CLARIFICATION OF MANDATE.

The petitioner, Mark O. Davis, prays that an order be entered herein recalling the mandate of this Court, issued December 5, 1938, for the purpose of clarification, and for grounds of his petition respectfully shows to this Honorable Court:

On October 29, 1925, a decree was entered by the Supreme Court of the District of Columbia (now the District Court of the United States for the District of Columbia) granting the petitioner a divorce *a mensa et thoro* from the respondent on the ground of cruelty. The custody of a son was awarded to the petitioner and that of a daughter to the respondent. It directed petitioner to pay $300 a month for the

support of wife and daughter. At the date of this decree an absolute divorce was not permitted in the District of Columbia for desertion or cruelty, while in Virginia such a divorce was authorised where either party wilfully deserted or abandoned the other for three years. The circuit courts of that state have jurisdiction over suits for divorce and alimony.

Thereafter, the petitioner removed to Arlington County, Virginia, where, after residing for more than one year, he filed his bill for absolute divorce on the ground of desertion. The respondent appeared and contested the standing of the petitioner to maintain the action on the ground that he had not been a *bona fide* resident of the state for one year, as required by statute. Although denominated by respondent a special appearance, this Court has held her conduct amounted to a general appearance.

After hearing, the court held the petitioner had standing to maintain his action. Although seasonably notified of subsequent proceedings in the cause, respondent did not further participate therein. On June 26, 1929, a decree granted petitioner an absolute divorce, without alimony to the respondent.

On December 30, 1929, the petitioner applied to the District court to have its decree of October 29, 1925, set aside or modified *so as not to require him to pay any amount for maintenance of respondent.* She appeared and opposed the application, but raised no question as to the jurisdiction of the Virginia court. The petition was denied, and the United States Court of Appeals for the District of Columbia affirmed on the ground that the District court retained jurisdiction to enforce or modify its order for maintenance of the wife and daughter; and that the removal to Virginia of the petitioner did not invest the courts of that State with authority to annul or supersede that jurisdiction. It held that the District court, having first acquired jurisdiction of the subject matter, its authority continued until the cause was finally disposed of. Neither the district court nor the

court of appeals considered or decided any question as to the jurisdiction of the Virginia court.

On April 16, 1935, the petitioner filed in the district court another application to have its decree set aside or modified *as before prayed*. He sought relief on three grounds: The decree of the Virginia court, the fact that his daughter had married and was no longer living with respondent, and diminution of his income. The respondent answered, alleging that petitioner never was a resident of Virginia and denying the desertion found by the Virginia court. At the hearing, the petitioner abandoned his claim for relief on the ground of diminution of income. His petition was denied.

On appeal, the court below adhered to its earlier ruling that the district court retained jurisdiction, held that the Virginia decree was not entitled to full faith and credit in the District of Columbia, but reversed the cause on the ground that the district court should have considered the effect of the marriage of the daughter on the question of reduction of allowance to the respondent. This Court granted *certiorari*.

In its opinion, announced by Mr. Justice Butler on November 7, 1938, 83 L. ed. 52, this Court reversed the court of appeals, holding that it was the duty of the district court, under Article IV, Sec. 1 of the Constitution, to recognize the Virginia decree awarding the petitioner an absolute divorce without alimony to the respondent, and to give that decree "not some, but full credit." In the course of the opinion, it was stated:

> Petitioner frankly presented to the Virginia court the grounds on which he sought release. He gave respondent actual notice of the suit. She appeared, specially as she maintains, and raised and tried the question whether he had standing to sue. In view of these facts, and of her conduct, adjudged repugnant to the marital relation, *it would be unreasonable to hold that his domicil in Virginia was not sufficient to entitle*

him to obtain a divorce having the same force in the District as in that State. * *

Petitioner is entitled as a matter of right to have the Virginia decree given effect in the courts of the District of Columbia. The decree of the court of appeals must be reversed; the case will be remanded to the district court for proceedings in confirmity with this opinion.

Thereafter, upon the filing of the mandate of this Court in the district court, the petitioner moved for a decree thereon. Among others, his proposed decree contained the provision: "The decree entered herein October 29, 1925, be and it is hereby vacated insofar as it awarded alimony to the defendant." Objection to the entry of the decree was made on the ground that this Court had decided that the petitioner was entitled to have the Virginia decree recognized only insofar as it dissolved the marriage relation, but had not determined that such recognition required the vacation of the alimony provision of the decree of October, 1925. Respondent's contention was based upon the following statement in the opinion of this Court: "No question is here presented as to the effect of the Virginia decree upon the power of the District of Columbia court over alimony." Petitioner claimed the language employed had reference to the holding of the court of appeals to the effect that the District and Virginia courts were tribunals of concurrent jurisdiction and that the District court having first acquired jurisdiction of the subject matter, the Virginia court was without authority to annul or supersede that jurisdiction.

Respondent also moved the court for a decree, recognizing the Virginia decree only insofar as it dissolved the marriage, and for an order adjudging the petitioner in contempt for failure to pay alimony after the announcement by this Court of its opinion.

The motions were submitted on briefs and, on March 13, 1939, Bailey, J., filed the memorandum opinion attached hereto as an appendix and made a part of this petition, in which he indicated his intention to enter the decree pro-

posed by the respondent, thus following the decision of the court of appeals, notwithstanding its reversal by this Court. Such a decree, it is submitted, would violate the mandate of this Court and be clearly in conflict with the conclusions expressed in its opinion.

The court of appeals having held that the lower court committed error in not giving consideration to the marriage of the daughter on the question of reduction of alimony, the only question remaining for review by this Court was whether the court of appeals erred in denying the prayer of the petitioner that the Virginia decree be recognized to the extent of vacating the alimony provision of the decree of October, 1925. Obviously, this Court would not have reversed the court of appeals unless it concluded that its judgment in the latter respect was erroneous. It is believed this position finds support in the action of this Court in remanding the cause, not to the court of appeals, but directly to the district court.

Unless relief is obtainable in this Court, the petitioner will be subjected to the delay and expense of again litigating the cause in the lower courts and, if permitted, ultimately bringing it to this Court; and, in the meantime, will be required to pay alimony at the rate of $300 per month, with little hope of having the amount so paid ever restored.

In view of the apparent uncertainty on the part of the district court as to whether, under the decision of this Court, the alimony provision of the decree of October 29, 1925, should be vacated, and the Virginia decree given full, and not some, effect, it is respectfully prayed that the mandate of this Court be recalled and so clarified as to remove all doubt on this point.

Respectfully submitted,

JOSEPH T. SHERIER,
Attorney for Petitioner.

APPENDIX.

Filed Mar. 13, 1939. Charles E. Stewart, Clerk.

In the District Court of the United States for the District of Columbia.

Equity No. 43,763.

DAVIS, *Plaintiff*,

v.

DAVIS, *Defendant*.

The husband obtained a limited divorce from his wife in this court, but was ordered to pay alimony and the court retained jurisdiction under the statute as to the question of alimony. In December, 1929, the husband sought to have the decree modified so as to provide for the support of the daughter only, basing his demand upon the fact that he had obtained in the meanwhile an absolute divorce from his wife in Virginia. The application was denied and the action of the trial court affirmed by the Court of Appeals, the latter court holding that the trial court retained jurisdiction as to alimony and the support of the daughter, but did not decide as to whether or not the Virginia court had jurisdiction to grant the divorce. In April, 1935, the husband again sought to have the court set aside or modify its decree upon the ground that the daughter had married, and also offered in evidence the decree of the Virginia court. The court denied the application. On appeal, the Court of Appeals held that the Virginia decree was not entitled to full faith and credit, Virginia not having been the last matrimonial domicil of the parties. It held that the trial court was in error in failing to consider the effect of the marriage of the daughter and reversed upon that ground.

The Supreme Court granted certiorari and held that the wife had submitted to the Virginia court the question of her husband's domicil and had also appeared generally in the case and was bound by the action of the Virginia court; also

that the lower courts had erred in not giving full faith and credit to the Virginia decree. The Court stated, however: "No question is here presented as to the effect of the Virginia decree on the power of the District of Columbia Court over alimony."

In one of the appeals in this case (*Davis v. Davis*, 61 App. D. C. 48) the Court of Appeals said:

"Therefore, according to the statutes of the District of Columbia, the lower court, after passing upon the decree of divorce in the case, retained jurisdiction of the parties and the cause with authority to enter further and additional orders therein respecting the alimony of the wife and the care and custody of the minor daughter. The court accordingly was vested with authority to continue and enforce its orders already entered in these respects. The removal of the plaintiff's residence to the state of Virginia, even if lawfully accomplished, cannot invest the courts of that state with authority to annul or supersede that jurisdiction."

The result is, I think, that this court retains jurisdiction for the purpose of enforcing or modifying its decree for alimony. The Thompson and Bloedorn cases are not in point. In each, the wife sought maintenance under the statute allowing the wife to require the husband to make provision for her support. Upon the divorce she ceased to be the wife, and was not entitled to relief under the statute. Under the law of the District of Columbia, the husband can be required to contribute to the wife's support even though he be the successful party in a suit for divorce.

The question of the modification of the order for alimony by reason of the marriage of the daughter should be set for hearing, and pending that hearing no action will be taken on the other motions made in this cause, other than the entry of an order on the mandate. As to the latter, I am inclined to think that the one submitted by counsel for

the wife is proper, but am willing to hear any objections that may be raised by counsel for the husband.

BAILEY, J.

A true copy.

Test:

CHARLES E. STEWART, *Clerk.*
By: LYDIA M. GARDINER,
Asst. Clerk.

P. 7, 5,

SUPREME COURT OF THE UNITED STATES.

No. 16.—October Term, 1938.

Mark O. Davis, Petitioner,
vs.
Maude E. Davis.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[November 7, 1938.]

Mr. Justice Butler delivered the opinion of the Court.

The lower court held a decree of the circuit court of Arlington County, Virginia, entered June 26, 1929, granting petitioner an absolute divorce from respondent upon the ground of desertion not entitled to recognition in the supreme (now district) court of the District of Columbia. The question arose upon his application to that court to set aside or modify a decree it entered October 29, 1925 granting him divorce *a mensa et thoro* from respondent on the ground of cruelty.

In the District of Columbia absolute divorce was not then permitted for desertion or cruelty.[1] In Virginia absolute divorce was authorized where either party willfully deserted or abandoned the other for three years.[2] The circuit courts there have jurisdiction over suits for divorce and alimony. No suit for divorce is maintainable unless one of the parties has been domiciled in the State for at least a year preceding its commencement.[3]

Petitioner and respondent married in 1909 and, until about the time he brought the suit for limited divorce, lived together in the District of Columbia. They had a son and daughter. The decree of separation awarded to him custody of the son, to her custody of the daughter, and directed him to pay $300 a month for support of wife and daughter.

Petitioner's complaint in the Virginia court alleged that he was a resident of that State for the requisite time, showed that re-

1 D. C. Code, Tit. 14, § 63.
2 Va. Code, 1924, § 5103.
3 Va. Code, 1936, § 5105.

spondent was a resident of the District of Columbia, fully disclosed the proceedings and decree in the District court, and alleged continuous desertion commencing before and extending for more than three years after entry of that decree. Process of the Virginia court was served personally upon the respondent in the District of Columbia. She filed a plea stating that she appeared "specially and for no other purpose than to file this plea to the jurisdiction of the court." In that document she alleged that neither she nor petitioner had been a resident of Virginia for a year before commencement of the suit and asserted that he was not then a bona fide resident there but that the residence he was attempting to establish was for the sole purpose of creating jurisdiction in the court to hear and determine the suit for divorce and was therefore a fraud upon the court and not residence in contemplation of law. The plea prayed judgment whether the court "can or will take any further cognizance of the action aforesaid."

The court entered a decree reciting that the cause came on for hearing upon the complaint, exhibits, other papers, and "argument of counsel" and referring the cause to a commissioner in chancery to ascertain and report whether the court had jurisdiction to hear and determine it and whether a decree of divorce should be entered. The commissioner reported that "by stipulation of counsel it was agreed", that he should only ascertain the facts raised in the plea to the jurisdiction and that no other matter should be inquired into or reported; that he had taken all the testimony submitted by the parties; that in his opinion petitioner was a bona fide resident of Arlington County, Virginia, and that the court had jurisdiction to hear and determine the cause.

Respondent filed exceptions, reiterating the allegations of her plea and asserting that the commissioner's findings were contrary to the evidence. There was a hearing upon the report and exceptions. After argument of counsel for the parties and upon consideration of the evidence, the court found that petitioner was a resident of Arlington County, Virginia, for the requisite time, that it had jurisdiction of the "subject matter and of the parties", overruled the exceptions, and confirmed the report. Respondent having signified her desire to apply for an appeal, the court ordered operation of the decree suspended for a period of thirty days. It also granted respondent ten days "within which to file such answer

or other pleadings in this cause as she may wish." She did not appeal or file answer or other pleading.

The final decree states that the case came on for hearing upon specified papers and depositions of five named persons taken before a commissioner pursuant to notice served in Arlington County, on counsel who had entered special appearance for respondent, and upon her personally in the District of Columbia. It found: Respondent willfully deserted petitioner February 24, 1925; the desertion continued from that date; three years had elapsed since the entry of the decree *a mensa et thoro;* there has been no reconciliation, and none is probable. It granted petitioner absolute divorce, divested respondent of all rights in his property, and required him to pay $150 per month for support of the daughter. No alimony was allowed respondent.

December 30, 1929 petitioner applied to the District court to have its decree set aside or modified so as not to require him to pay any amount for maintenance of respondent but to provide for the payment of a reasonable sum for the support of their daughter. The application was based solely upon the Virginia decree. Respondent appeared and opposed the application but raised no question as to the jurisdiction of the Virginia court. It was denied. The court of appeals affirmed on the grounds that the lower court, having entered the decree, retained jurisdiction to enforce or modify its order for maintenance of the wife and daughter; that petitioner's removal to Virginia did not invest the courts of that State with authority to annul or supersede that jurisdiction; and that, the District court having first acquired jurisdiction of the subject matter, its authority continues until the matter is finally disposed of. 57 F. (2d) 414. In passing upon that application, neither court considered or decided any question as to jurisdiction of the Virginia court.

April 16, 1935 petitioner filed in the District court another application to have its decree set aside or modified as before prayed. He then sought relief on three grounds: The decree of the Virginia court, the fact that his daughter had married and was no longer living with respondent, and diminution of his income. Respondent answered, alleging that petitioner never was a resident of Virginia and denying the desertion found by the Virginia court. There was a hearing, at which petitioner offered evidence showing the proceedings and decree in the Virginia court, the mar-

riage of the daughter and that she was living with her husband. Then counsel for respondent applied for time to secure her attendance and that of witnesses who, as he said, would give testimony that petitioner went to Virginia for the sole purpose of getting a divorce, and that he never became a bona fide resident there. Petitioner's counsel admitted that, if present, respondent and the witnesses referred to would so testify, but insisted that the testimony would be incompetent. Respondent offered no other evidence. The trial court denied the application.

The court of appeals, in an unreported opinion, held its earlier decision established the law of the case. Declaring petitioner not responsible for maintenance of his daughter after her marriage, it held that fact should be taken into account, and remanded the case for further consideration as to the amount of alimony to be allowed respondent. Petitioner applied for and the court granted rehearing. It heard argument and filed an opinion, in which it adhered to its ruling that its earlier decision was the law of the case, and held that the decision of the lower court refusing to enforce petitioner's decree of absolute divorce should stand. It said: "The Virginia court did not have full jurisdiction of the parties and the subject matter, and hence the decree was not entitled to full faith and credit. . . . It was necessary . . . under *Haddock* v. *Haddock* [201 U. S. 562] . . . that Virginia be the last matrimonial domicil of the parties or, if not, that the wife be subjected to the jurisdiction of the court below, either by personal service within the State, or by voluntary appearance and participation in the suit". It held that the matrimonial domicil was not in Virginia; that respondent's special appearance did not give the Virginia court full jurisdiction, or constitute waiver of her objection to jurisdiction. It held petitioner's application one addressed to the discretion of the lower court and that its omission to consider the marriage of the daughter constituted failure to exercise discretion. Accordingly, it reversed and remanded for further proceedings in accordance with the opinion. 96 F. (2d) 512.

Art. IV, § 1 requires that judicial proceedings in each State shall be given full faith and credit in the courts of every other State.[4] The Act of May 26, 1790, 1 Stat. 122, as amended, R. S.

[4] "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

1905, 28 U. S. C. § 687 declares that judicial proceedings authenticated as there provided shall have such faith and credit given to them in every "court within the United States as they have by law or usage in the courts of the State from which they are taken."[5] Thus Congress rightly interpreted the clause to mean not some but full credit. *Haddock* v. *Haddock*, *supra*, 567. The Act extended the rule of the Constitution to all courts, Federal as well as State. *Mills* v. *Duryee*, 7 Cr. 481, 485.

As to petitioner's domicil for divorce and his standing to invoke jurisdiction of the Virginia court, its finding that he was a bona fide resident of that State for the required time is binding upon respondent in the courts of the District. She may not say that he was not entitled to sue for divorce in the state court, for she appeared there and by plea put in issue his allegation as to domicil, introduced evidence to show it false, took exceptions to the commissioner's report, and sought to have the court sustain them and uphold her plea. Plainly, the determination of the decree upon that point is effective for all purposes in this litigation. *Baldwin* v. *Traveling Men's Assn.*, 283 U. S. 522, 525-526.

Nor can it be said that the domicil was not adequate to support, in virtue of the rule of full faith and credit established by Congress, decree enforceable in the courts of the District of Columbia. Depending on the connection in which used, various meanings have been attributed to the phrase matrimonial domicil. See *Atherton* v. *Atherton*, 181 U. S. 155, 171; *Andrews* v. *Andrews*, 188 U. S. 14, 40; *Haddock* v. *Haddock*, *supra*, 572; *Thompson* v. *Thompson*, 226 U. S. 551, 562. Definition, inclusive and exclusive, is not to be found; it need not be attempted here. It is enough to say that care should always be taken to determine upon the facts and circumstances of each case whether, in accordance with the general rule, it is the domicil of the husband. See *Cheely* v. *Clayton*, 110 U. S. 701, 705; *Thompson* v. *Thompson*, *supra*. Cf. *Barber* v. *Barber*, 21 How. 582, 594; *Cheever* v. *Wilson*, 9 Wall. 108, 124. In this case, the

[5] "The acts of the legislature of any State or Territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such State, Territory, or country affixed thereto. The records and judicial proceedings of the courts of any State or Territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken."

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wife has been adjudged by the decree *a mensa et thoro*, on which she relies, to have disrupted the marital relation. And by the decree of the Virginia court, the enforcement of which she opposes, she is adjudged to have persisted in desertion of petitioner for a period more than sufficient to entitle him under the laws of that State to dissolution of the bonds. Cf. *Harding* v. *Harding*, 198 U. S. 317, 338-339. While in that State litigating the question of his standing to sue, she chose not to answer charges of willful desertion.

This case differs essentially from *Haddock* v. *Haddock*, *supra*, relied on by the lower court. There the husband, immediately after marriage in New York, fled to escape his marital obligations and never returned to discharge any of them. The wife remained in that State. He acquired domicil in Connecticut and there obtained absolute divorce. She did not appear in the Connecticut court for any purpose. There was no suggestion that she was at fault or did anything to disrupt the marital relation. In this case, there exists none of the reasons on which we held the New York court not bound by the full faith and credit clause to enforce in that State the husband's Connecticut divorce. Petitioner frankly presented to the Virginia court the grounds on which he sought release. He gave respondent actual notice of the suit. She appeared, specially as she maintains, and raised and tried the question whether he had standing to sue. In view of these facts, and of her conduct, adjudged repugnant to the marital relation, it would be unreasonable to hold that his domicil in Virginia was not sufficient to entitle him to obtain a divorce having the same force in the District as in that State.

As to respondent's appearance in the Virginia court.—The assertion in her plea that it was special and made for the sole purpose of challenging jurisdiction is of no consequence if in fact it was not so limited. *Sugg* v. *Thornton*, 132 U. S. 524, 530. *Sterling Tire Corporation* v. *Sullivan*, 279 Fed. 336, 339. If the plea alone may not be held to amount to a general appearance, there arises the question whether, by her participation in the litigation and acquiescence in the orders of the court relating to merits, she submitted herself to its jurisdiction for all purposes. Her plea and conduct are to be considered together.

There had been no claim of jurisdiction over her person. The plea did not challenge jurisdiction over petitioner or the court's

authority, if appropriately invoked, to grant the decree petitioner sought. It merely asserted that he lacked domicil required by Virginia law. Her allegations and prayer show that the sole purpose of the plea was to join issue with petitioner's allegation of domicil in Virginia, to secure a finding against him on that point, to obtain decree that he had no standing to bring the suit and so put an end to his efforts to obtain divorce in that State.

The recital in the decree of reference, that the cause came on for hearing upon, *inter alia*, argument of counsel, suggests that both parties were heard. The stipulation of counsel that the commissioner should only ascertain the facts raised by her plea shows action by both parties relating to merits, at least to the extent that it withdrew the case from the commissioner. The record discloses no challenge by respondent to the statement, in the decree overruling her exceptions, that the court had jurisdiction of the subject matter and of the parties. The grant of time within which to answer implies application to that end. A motion for such an order relates to merits. *Hupfeld* v. *Automaton Piano Co.*, 66 Fed. 788, 789. The service of notice of taking depositions upon respondent in the District of Columbia and upon her counsel in Virginia implies that petitioner's counsel understood that respondent had standing to appear and cross examine. Plainly her plea and conduct in the Virginia court cannot be regarded as special appearance merely to challenge jurisdiction. Considered in its entirety, the record shows that she submitted herself to the jurisdiction of the Virginia court and is bound by its determination that it had jurisdiction of the subject matter and of the parties. Cf. *Andrews* v. *Andrews*, *supra*, 40.

No question is here presented as to the effect of the Virginia decree on the power of the District of Columbia court over alimony.

Petitioner is entitled as a matter of right to have the Virginia decree given effect in the courts of the District of Columbia. The decree of the court of appeals must be reversed; the case will be remanded to the district court for proceedings in conformity with this opinion.

It is so ordered.